(1)

No. 01-7662-CFH Title: Thomas Joe Miller-El, Petitioner
v.
CAPITAL CASE Janie Cockrell, Director, Texas Department of Criminal Justice, Institutional Division

Docketed:
January 11, 2002 Court: United States Court of Appeals for the Fifth Circuit

Entry	Date	Proceedings and Orders
	Dec 11 2001	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due February 10, 2002)
	Jan 16 2002	Brief of respondent Janie Cockrell, Director in opposition filed.
	Jan 23 2002	Reply brief of petitioner Thomas J. Miller-El filed.
	Jan 23 2002	Brief amici curiae of Arlin Adams and Julie Sullivan (TBP) filed.
	Jan 24 2002	DISTRIBUTED for Conference of February 15, 2002
	Feb 15 2002	Petition GRANTED. SET FOR ARGUMENT October 16, 2002. **********
	Feb 19 2002	Application (01A628) for a stay of execution, submitted to Justice Scalia.
	Feb 20 2002	Application (01A628) granted by Justice Scalia.
	Mar 4 2002	The order granting the petition for a writ of certiorari is amended to read as follows: The motion for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted limited to the following question: Did the Court of Appeals err in denying a certificate of appealability and in evaluating petitioner's claim under Batson v. Kentucky?
	Mar 28 2002	Order extending time to file the joint appendix and petitioner's brief on the merits to and including May 13, 2002.
	May 3 2002	Order further extending time to file the joint appendix and petitioner's brief on the merits to and including May 28, 2002.
	May 28 2002	Joint appendix filed.
	May 28 2002	* Joint appendix in two volumes
	May 28 2002	Brief of petitioner Thomas Joe Miller-El filed.
	May 28 2002	Brief amici curiae of Former Prosecutors and Judges filed.
	May 28 2002	Brief amici curiae of NAACP Legal Defense and Educational Fund, Inc., et al. filed.
	Jun 21 2002	Order extending time to file respondent's brief on the merits to and including July 29, 2002.
	Jul 23 2002	LODGING consisting of twenty bound copies of documents submitted by counsel for both parties
	Jul 29 2002	Brief of respondent Janie Cockrell, Director filed.
	Aug 1 2002	CIRCULATED.
	Aug 12 2002	Application (02A118) to extend the time to file a reply brief from August 30, 2002 to September 11, 2002, submitted to Justice Scalia.
	Aug 14 2002	Application (02A118) denied by Justice Scalia.
	Aug 23 2002	Record filed.

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No. 01-7662-CFH

Entry	Date	Proceedings and Orders
	Aug 28 2002	Record filed.
	Aug 30 2002	Reply brief of petitioner Thomas J. Miller-El filed.
	Oct 10 2002	Letter from counsel for the petitioner received and distributed.
	Oct 16 2002	ARGUED.

ORIGINAL

No. 01-7662

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2001

Supreme Court, U.S.
FILED
DEC 11 2001
OFFICE OF THE CLERK

THOMAS JOE MILLER-EL,

Petitioner,

v.

JANIE COCKRELL,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THIS IS A DEATH PENALTY CASE.
MR. MILLER-EL IS SCHEDULED TO BE EXECUTED ON FEBRUARY 21, 2002.

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a court is required to ignore uncontested evidence of a pattern and practice of racial discrimination, and evidence of contemporaneous instances of discrimination, when assessing the genuineness of the alleged discriminator's proffered race-neutral reason for exercising a peremptory challenge?

2. Whether the court of appeals incorrectly concluded that 28 U.S.C. § 2254(d)(2) and § 2254(e)(1) require a habeas corpus petitioner to rebut state court determinations of fact by proving them "unreasonable" by "clear and convincing evidence"?

3. When assessing whether the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," may a federal court ignore the unreasonableness of the process by which the state court determined the facts?

4. Whether 2254(d)(2) embodies a presumption of correctness applicable to state court factfindings or a standard for assessing when a petitioner is entitled to relief?

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2001

THOMAS JOE MILLER-EL,

Petitioner,

v.

JANIE COCKRELL,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner-Appellant Thomas Joe Miller-El asks that this Court issue a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is published as *Miller-El v. Johnson*, 261 F.3d 445 (5th Cir. 2001). *See* App. 1.[1] The state court's unpublished opinion denying Mr. Miller-El's direct appeal, *Miller-El v. State*, No. 69, 677 (Tex. Crim. App. Sept. 16, 1992), is attached as Appendix 2. The trial court's findings of fact and conclusions of law in state post-conviction proceedings is

[1] Mr. Miller-El will cite the record as follows. Citations to the appendices to this petition are indicated by "App. __ at __." The pre-trial *Swain* hearing is cited as "S.F. (P.T.):__." Citations to the *voir dire* are indicated as "V.D. Vol. __ : __." The trial on the merits is cited as "S.F. Vol. __: __."

attached as Appendix 3, and the Texas Court of Criminal Appeals' order adopting the trial court's findings and denying relief is attached at Appendix 4. Appendix 5 is the federal Magistrate Judge's recommendations regarding Mr. Miller-El's federal habeas corpus petition. The opinion of the federal district court adopting the Magistrate Judge's recommendations, *Miller-El v. Johnson*, No. 3:96-CV-1992-H (N.D. Tex. June 5, 2000), is attached as Appendix 6.

JURISDICTION

On August 7, 2001, the Court of Appeals affirmed the district court's denial of Mr. Miller-El's petition for writ of habeas corpus. The Court of Appeals denied his timely filed petitions for panel and en banc rehearing on September 12, 2001. App. 7. Mr. Miller-El is scheduled to be executed on February 21, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

The questions presented implicate the following provisions of the United States Constitution:

AMEND. XIV

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

AMEND. XIV

[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATUTORY PROVISIONS AT ISSUE

The questions presented implicate the following provisions of the United States Code:

28 U.S.C. § 2254(d)(2)

An application for a writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(e)(1)

[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

The issues presented herein were thoroughly presented to the state courts. Mr. Miller-El was convicted of capital murder and sentenced to death on March 24, 1986, shortly before this Court handed down its decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). Prior to the trial on the merits, Mr. Miller-El's counsel challenged the prosecution's jury selection practices after the State used jury shuffles to reduce the chances that African-American panel members would advance to the stage at which they would be individually voir dired for jury service, and subsequently used peremptory challenges to remove ten of eleven qualified African-American jurors. At the pre-trial hearing on his *Swain*[2] motion, Mr. Miller-El adduced considerable evidence[3] that the Dallas County District Attorney's Office engaged in a pattern and practice of excluding citizens from jury service on the basis of race, including an office training manual advising prosecutors to remove minority jurors. App. 8. Nonetheless, the trial court denied Mr. Miller-El's motion. S.F. (P.T.):146.

The Texas Court of Criminal Appeals ("CCA") abated Mr. Miller-El's direct appeal to permit the trial court to conduct a *Batson* hearing, at which the prosecutors offered reasons for their strikes. *Miller-El v. State*, 748 S.W.2d 459 (Tex. Crim. App. 1988). Following the *Batson* hearing, the CCA affirmed Mr. Miller-El's conviction and death sentence in a unpublished opinion. App. 2. The CCA denied rehearing on January 20, 1993, and this Court denied Mr.

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[2] *Swain v. Alabama*, 380 U.S. 202 (1965).

[3] The comprehensive evidence, presented during Mr. Miller-El's pre-trial hearing, of Dallas County's pattern and practice of racial discrimination in jury selection is discussed *infra* in Reasons for Granting the Writ of *Certiorari*.

Miller-El's petition for a writ of certiorari on October 4, 1993. *Miller-El v. Texas*, 510 U.S. 1004 (1993).

In state post-conviction proceedings, Mr. Miller-El sought relief based on his incompetence to stand trial and the trial court's failure to conduct a hearing *sua sponte* regarding Mr. Miller-El's competency to stand trial. App. 3. Mr. Miller-El was arrested for capital murder in Houston, Texas, after S.W.A.T. officers shot him with an exploding round of ammunition that caused extensive internal injuries. S.F. Vol. II:694; Amended Petition for Writ of Habeas Corpus (filed June 17, 1997), *Miller-El v. Johnson*, No. 3:96-CV-1992-H (N.D.Tex) ("Amend. Pet.") at Exhibit. 18. After spending two months in a Houston hospital, Mr. Miller-El was transferred to Dallas County, where he was tried for capital murder. *Miller v. Johnson*, 261 F.3d 445, 452 (5th Cir. 2001). During his trial, Mr. Miller-El experienced serious medical complications and was transported to the hospital on three occasions. Amend. Pet. at Exhibit 24. The trial court requested medical evaluations of Mr. Miller-El on three occasions. The third request – which followed the onset of medical complications that interrupted the punishment phase proceedings and resulted in Mr. Miller-El's third hospitalization – was for the express purpose of ascertaining Mr. Miller-El's fitness to attend court. App. 1 at 14-15. Yet, despite its repeated questions about Mr. Miller-El's condition, the court never convened a hearing to determine whether Mr. Miller-El was competent to stand trial.

The state courts denied Mr. Miller-El's repeated requests for an evidentiary hearing during post-conviction proceedings. Instead, the convicting court adopted the State's proposed findings of fact and conclusions of law, which had been submitted *ex parte*. App. 9; App. 5. On June 17, 1996, the CCA denied Mr. Miller-El's application for a writ of habeas corpus in a *per curiam* order adopting the findings of the convicting court.

Mr. Miller-El presented his *Batson* and competency-to-stand-trial claims in his federal

habeas corpus petition. The Magistrate Judge recommended that Mr. Miller-El's petition be denied, *see* App. 5, and the district court adopted the magistrate's recommendation on June 5, 2000. App. 6. The Fifth Circuit affirmed the district court, App. 1, and subsequently denied his timely requests for panel and *en banc* rehearings. App. 7.[4]

REASONS FOR GRANTING THE WRIT OF CERTIORARI

ISSUE 1

THIS COURT SHOULD GRANT CERTIORARI AND DECIDE WHETHER COURTS MUST CONSIDER COMPELLING EVIDENCE OF A PATTERN AND PRACTICE OF RACIAL DISCRIMINATION IN THE EXERCISE OF PEREMPTORY CHALLENGES, AND OTHER RACIALLY DISCRIMINATORY BEHAVIOR DURING JURY SELECTION, DURING THE THIRD STEP OF THE DISCRIMINATION INQUIRY.

I. Introduction.

Between 1942 and 1950, this Court was called upon to redress intentional racial discrimination in the selection of Dallas County grand juries on three occasions.[5] The Court's decisions unambiguously condemned the racial discrimination in Dallas County's trial process.[6]

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[4] The opinions of the courts below are discussed at length in the Reasons for Granting the Writ of *Certiorari*.

[5] *Hill v. Texas*, 316 U.S. 400 (1942); *Akins v. Texas*, 325 U.S. 398 (1945); *Cassell v. Texas*, 339 U.S. 282 (1950).

[6] In *Hill*, this Court stated:

> [N]o state is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid. Nor is this Court at liberty to grant or withhold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty . . . . Equal protection of the laws is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may command.

Hill, 316 U.S. at 406. *See Cassell*, 339 U.S. at 286 ("Jurymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race.").

Not long after this Court admonished Dallas County for excluding its citizens from participation in the justice system on the basis of race, the Dallas County District Attorney's Office prepared a treatise on jury selection in criminal cases advising its prosecutors to "not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated." The essential content of this advice remained in the training materials of Dallas County prosecutors at least until 1980. Statistics and other evidence demonstrate that prosecutors were still exercising peremptory challenges on the basis of race at the time of Mr. Miller-El's trial in 1986, especially in death penalty cases. Moreover, the same prosecutors who tried Mr. Miller-El were found to have exercised peremptory challenges on the basis of race in cases tried immediately before and after Mr. Miller-El's. During Mr. Miller-El's trial, the prosecutors removed ten of eleven qualified black jurors with peremptory strikes.

None of the above facts are disputed. At issue, however, is whether any of this compelling evidence is relevant to the genuineness of the prosecutors' motive, or to a court's assessment of the credibility of the proffered race-neutral reasons for their strikes. Based on a mistaken belief that this Court's Equal Protection jurisprudence so required, the courts below refused to consider Dallas County's uncontested pattern and practice of discrimination at any stage of the *Batson* inquiry beyond determining whether Mr. Miller-El had made out a *prima facie* case for discrimination. The lower courts have uncritically accepted the purported race-neutral reasons offered by the prosecutors, without considering the totality of the evidence offered by the petitioner in deciding the ultimate question. This Court should grant *certiorari* to ensure that lower courts do not allow racial discrimination to go unremedied, and to redress the denial of Equal Protection suffered by Mr. Miller-El during his capital trial.

II. Mr. Miller-El assembled and presented compelling evidence that Dallas County's pattern and practice of racial discrimination continued unabated through his trial.

A. Dallas County's pattern and practice of systemic racial discrimination in the selection of petit juries is undisputed.

1. The Dallas County District Attorney's Office promulgated explicit, written policies instructing prosecutors to use peremptory challenges to prevent minorities from sitting on juries.

In 1963, a treatise on jury selection prepared by a top aide to Dallas County District Attorney Henry Wade advised prosecutors in no uncertain terms to prevent "Jews, Negroes, Dagos, Mexicans, or a member of any minority race [from sitting] on a jury." App. 10, 11; *see also Batson v. Kentucky*, 476 U.S. 79, 104 n.3 (Marshall, J., concurring) (quoting newspaper article). In 1969, another treatise, written by Assistant District Attorney Jon Sparling, advised Dallas County prosecutors that minority jurors were undesirable because they "empathize with the accused." App 8 at 3. This jury selection memorandum was incorporated into a training manual given to all new Dallas County prosecutors, and its teachings were often the basis of live presentations by its author. S.F. (P.T.):29-30. The jury selection memo remained, with its discriminatory advice intact, in the prosecutors' manual until at least the early 1980s.[7]

2. Statistical studies demonstrate that at the time of Mr. Miller-El's trial, the Dallas County District Attorney's Office struck 90.3% of qualified black jurors in capital murder cases.

In 1986, the *Dallas Morning News* studied one hundred trials selected at random from the 1,036 felony jury trials held in Dallas County in 1983, and analyzed court records relating to 4,434 prospective jurors in order to determine the race of the jurors, whether they were excluded from jury service, how, and by whom. App. 10, 11; *see* Application for Certificate of

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[7] *See Ex Parte Haliburton*, 755 S.W.2d 131, 133 n.4 (Tex. Crim. App. 1988) (Ron Wells, a Dallas County prosecutor, confirmed that shortly after he joined the district attorney's office in 1980, he was given a copy of the standard prosecutor's manual, which contained the Sparling Memorandum).

Appealability, *Miller-El v. Johnson*, 261 F.3d 445 (5th Cir. 2001) ("COA") at 15-21 (discussing Dallas Morning News study and reproducing charts and graphs from the study). The study concluded that although blacks comprised 18% of Dallas County's population, less than 4% of jurors were black. The chance of a qualified black serving on a jury was one-in-ten, compared to a one-in-two chance for a qualified white. *Eighty-six percent* (405 out of 467) of otherwise-qualified African-American jurors were struck with peremptory challenges by the State. *See id.*

The pattern of exclusion in capital murder cases was even starker. In December 1986, the Dallas Morning News published another article examining the fifteen capital murder cases tried in Dallas County between 1980 and December 1986. App. 12, 13. In these fifteen capital cases, the prosecution used peremptory challenges to remove *90.3%* (56 out of 62) of the qualified African-American jurors. Out of 180 jurors in the fifteen trials, only five, or 2.8%, were black. *See id.*

3. Dallas judges and lawyers testified that the Dallas County prosecutors routinely excluded African-Americans from criminal juries in the 1980s.

At Mr. Miller-El's pre-trial hearing, judges and lawyers from Dallas testified that it was common knowledge in the Dallas County legal community that Dallas County assistant district attorneys routinely excluded all African-Americans from jury service in the mid-1980s. Dallas County criminal district court judges provided specific examples of the prosecutors' racially discriminatory selection procedures. S.F. (P.T.):103-04 (one judge testified that a prosecutor had admitted that a jury shuffle had been requested in order to reduce the number of blacks on the jury); S.F. (P.T.):74-77 (another judge testified that he had excluded a prosecutor from his court in 1985 because of discriminatory selection procedures). At a *Swain* hearing held in connection with *Ex Parte Haliburton*, 755 S.W.2d 131 (Tex. Crim. App. 1988), numerous defense attorneys testified that Dallas County prosecutors so consistently used their peremptory challenges against black jurors that the defense attorneys did not "waste" strikes on pro-State black jurors. *See*

Haliburton, 755 S.W.2d at 132-33 & n.4.

4. Mr. Miller-El's prosecutors were trained to employ racially discriminatory tactics and were found to have engaged in intentional racial discrimination in cases tried immediately before and after Mr. Miller-El's.

Paul Macaluso was the prosecutor in charge of the jury selection in Mr. Miller-El's case, a self-proclaimed "jury selection specialist." He joined the Dallas County District Attorney's Office in 1973 and was trained at a time when the office actively taught the racially-discriminatory methods in the jury selection manual. Mr. Macaluso voir dired potential jurors in several of the fifteen capital cases identified in the Dallas Morning News study discussed above, in which 90.3% of qualified African-American jurors were removed by State peremptory strikes. *See* Amend. Pet. at Exhibit 12 (reproducing portions of *voir dire* transcripts).

In a case tried just before Mr. Miller-El's trial, Mr. Macaluso picked the jury and was later found by the Texas courts to have engaged in racially discriminatory selection procedures. *See Chambers v. State*, 784 S.W.2d 29 (Tex. Crim. App. 1988). The state appellate court "specifically" considered the race-neutral explanations proffered by Mr. Macaluso, and concluded that his testimony regarding his reasons for striking African-American jurors was *not credible*. The *Chambers* case provides a revealing and critical look at Paul Macaluso's jury selection strategy of manipulating the minimum punishment issue to disqualify African-American jurors:

> In addition to the black potential jurors stricken by the State peremptorily, the State successfully challenged two black potential jurors (Thomas Johnson & Sharon E. Curtis) and unsuccessfully attempted to challenge a third potential black juror (Loretta Rooks) on the basis that they would not consider the *minimum* punishment in the event Appellant was convicted of the lesser included offense of murder. The State made no corresponding effort to challenge potential white jurors on the basis of their willingness to consider the minimum punishment for a lesser included offense.

Chambers, 784 S.W.2d at 31. This pattern of disparate questioning on the minimum punishment issue was also followed in Mr. Miller-El's case. *See infra* at 12. The trial court in *Chambers*

recognized that the State's peculiar and persistent attempts to disqualify *only African-American* jurors on the ground that they may be too favorable *to the State's position* was compelling inferential evidence of discrimination. Mr. Chambers' conviction was reversed. *See Chambers*, 784 S.W.2d at 31-32.

Another prosecutor in Mr. Miller-El's case, James Nelson, was lead counsel in the trial of Mr. Miller-El's wife. Dorothy Miller-El was tried for murder and attempted capital murder only months after her husband was convicted, in the same court and before the same judge. Of the seven African-American potential jurors called for her trial, two were removed for cause by the defense. The prosecution then used five of its strikes to remove all of the remaining African-American venirepersons. The defense demanded a *Batson* hearing. The Texas courts held that the prosecutor's purported race-neutral reasons were a pretext for intentional racial discrimination, and Ms. Miller-El's conviction was overturned. *See Miller-El v. State*, 790 S.W.2d 351 (Tex. App. – Dallas 1990, no pet.).

B. The prosecutors who tried Mr. Miller-El adhered to the racially discriminatory jury selection practices of the Dallas County District Attorney's Office.

1. The prosecutors in this case used strikes to eliminate 91% of the qualified African-American jurors on the panel.

The prosecution struck ten of eleven – or *91%* – of the qualified African-American jurors. Only one African-American, Troy Woods, was allowed to serve on Mr. Miller-El's jury. Mr. Woods was also the only juror of any race to volunteer an opinion that people who commit murder should be slowly tortured to death. V.D. Vol. X:3847-48 ("[Execution is] too quick. They don't feel the pain. That's the way I feel about it . . . . Well, what I call punishment is back to the old Indian days. Pour some honey on them and stake them out over an ant bed. That's the way I feel about it. That's what I call punishment.").

2. The prosecutors race-coded their jury selection materials.

The juror information cards filled out by prospective jurors in Mr. Miller-El's trial did not provide a blank for a juror's race. Nevertheless, the race and gender of every juror is coded on each card, in the prosecutors' handwriting. *See* Supplemental Briefing on *Batson/Swain* Claim Based on Previously Unavailable Evidence (filed December 8, 1997), *Miller-El v. Johnson*, No. 3:96-CV-1992-H (N.D. Tex.), Exhibit 1, at 1-56. The prosecutors also kept racially-coded lists of all selected jurors, and all jurors struck by either side with peremptories. *See id.* at 57-60.

3. The prosecutors attempted to manipulate the "jury shuffle" process in order to effectively eliminate African-American jurors.

At the time of Mr. Miller-El's trial, both the defendant and the State had the absolute right to one jury shuffle.[8] In capital cases in Dallas County, jury shuffles were particularly important, since only the first few members of any of the fifty-member venire panels called each week were likely to be interviewed, and the jurors not reached in a specific week would be discharged from service. *See* V.D. Vol. I:16-17. The likelihood that the jurors at the back of the special venire would be needed was so small that the judge routinely dismissed the last fifteen jurors in the panel before even asking them to fill out questionnaires, as it did in this case. V.D. Vol. II:842-43; V.D. Vol. IV:1700.

At the beginning of the second week of *voir dire*, a panel of jurors was brought down and the State requested a shuffle. V.D. Vol. II:837. The defense asked "Could we ask the reason for the shuffle?" "No," the State responded. *Id.* The defense then made its concerns clear:

> For purposes of the record, I would like the record to indicate that within the first ten jurors, prospective jurors, four are black. Within the second set of ten prospective jurors, three are black and within the third set of prospective jurors, two are black and the fourth set of prospective jurors, one is black.

Id. When the third panel of jurors was originally seated in the courtroom, jurors number 1, 2, 3,

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[8] *Smith v. State*, 648 S.W.2d 695, 696 (Tex. Crim. App. 1983).

4, 8, and 15 were African-Americans. V.D. Vol. IV:1787. The State requested, and performed, a shuffle. *Id.* at 1781. After the State's shuffle, the six African-American jurors' positions had changed: they were now at positions 19, 26, 36, 37, 38, and 39. *Id.* at 1788. The defense then exercised its prerogative to shuffle the jurors. *Id.* at 1780. After this second shuffle, the African-American jurors were located at positions 1, 2, 3, 4, 7 and 14. *Id.* at 1788.

The twice-shuffled panel was then seated, and the last sixteen jurors excused. *Id.* at 1783. Mr. Nelson then asserted, for the first time in the jury selection process that the jurors "were not shuffled as thoroughly as they should have been." *Id.* at 1790. Moreover, despite the fact that both sides had exercised their shuffles in the central jury room on the previous two occasions without objection from either side, *id.* at 1784, the State announced that it wanted a re-shuffle of the jurors because the defense's shuffle had not been performed inside the courtroom, as the law required.

Mr. Miller-El objected, pointing out the State was merely manipulating the position of black jurors. *Id.* at 1787. The court rejected the State's request, ordered that all further shuffles take place in the courtroom, and observed that this was the first time in his twenty-five years practicing law and sitting on the bench in Dallas County that someone had raised an objection in his presence to the routine practice of shuffling in the central jury room. *Id.* at 1792-93.

Of course, the prosecution's efforts to shuffle and reshuffle the potential jurors took place *before* they knew anything about the jurors other than how they looked, because they had yet to fill out the jury questionnaires or be placed on a panel for *voir dire*.

4. Black jurors were subjected to blatantly disparate questioning.

The prosecutors at Mr. Miller-El's trial engaged in glaringly disparate questioning of prospective jurors based on race. For example, the prosecutors singled out black jurors and questioned them about their ability to assess the minimum punishment for non-capital murder, in a

manner almost never employed with white jurors. The form and substance of the *voir dire* were clearly designed to eliminate African-Americans by setting them up for cause challenges. White jurors were generally informed of the range of punishment first, and then asked whether they could impose the minimum sentence of five years, if appropriate to the facts of the case.[9] In sharp contrast, African-American jurors consistently were asked open-ended questions that forced them to speculate as to what the minimum punishment for non-capital murder *should* be, without any information about the actual range of punishment. The prosecutors subsequently used the number named by the juror to argue that the juror would be unwilling to consider the actual minimum sentence.[10] As noted *supra* at 9, the *Chambers* Court specifically cited this practice as evidence

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[9] The questioning of Mary I. Sumrow is a typical example. Before asking her about her attitude toward the minimum punishment in a murder case, the prosecutor twice explained the full range of punishment for murder. V.D. Vol. I:341, 355. He then explained that the range was that wide because "there are several of [sic] a multitude of circumstances under which one person could knowingly or intentionally cause the death of another individual." *Id.* at 355. He continued in this vein:

> Now, in order for you to be able to be qualified to serve as a juror, you have to tell us that you would be able to consider the entire range of punishment for murder . . . . At the other end, you have to be able to tell us that, if you feel that the facts and circumstances, as you find them to be, justify a sentence of five years, you can give that or twenty years or forty-five years, anything in between. As you're sitting there right now, Ms. Sumrow, you don't even have to be able to verbalize to us the facts and circumstances that would justify five years or that would justify life or something in between. You do have to tell us that, if the facts and circumstances justified that in your mind, whatever that may take, you would assess a five year sentence if you felt it was justified or a ninety-nine or life sentence if you felt that was justified.

Id. at 356-57. Ms. Sumrow answered that she could consider the minimum sentence and was accepted for jury service, *id.* at 357, 396, but was later excused due to medical hardship because of her pregnancy. V.D. Vol. VI:2401. Other strong pro-State jurors were handled in a similar manner. *See, e.g.*, V.D. Vol. II:549-51 (Carol Taylor); V.D. Vol. II:765-59 (Billy J. Wagoner); V.D. Vol. VII:2918-20 (Charles M. Smith).

[10] For example, when questioning Roderick Bozeman, Mr. Macaluso talked to the juror extensively about a hypothetical non-capital murder. Mr. Macaluso emphasized that the killing was "without any legal excuse or any legal justification whatsoever," that it was not in self-defense, that it was not an accident, that the defendant was not insane, and that the defendant had not acted in the heat of passion. V.D. Vol. I:308-09. Then, without having informed Mr. Bozeman of the actual range of

of Mr. Macaluso's discriminatory intent. *Chambers*, 784 S.W.2d at 31.

Similarly, the State was quite solicitous of the scheduling conflicts of African-American jurors, while insisting that white jurors who had vacation plans or employment commitments be compelled to serve. When questioning African-American jurors Fields and Bozeman, the State initiated inquiries into whether the juror had upcoming vacation time, or work or family obligations. *See* S.F. Vol. I:317 ("[a]ny problems at work or anything like that, family schedule?"); S.F. Vol. I:445 ("We have an indication, Judge, that this juror has what they denominate as an annual leave coming up in the next couple of weeks and we thought that was a situation that the Court ought to check into before a decision is made as to the qualification of this juror."). By contrast, a white juror requested that she be released from service because of a mandatory work-related training program and a previously scheduled vacation, toward which she already had paid a non-refundable $650.00 down payment. She informed the court that she would be very angry and distracted if she had to serve despite these conflicts and that this state of mind could affect her jury service. V.D. Vol. VIII:3248-52. Although the defense agreed to excuse the juror, the State emphasized that vacations or work training were not adequate excuses and argued, albeit unsuccessfully, that the juror be compelled to serve or that, in the alternative, the court contact her employer to determine whether alternate plans could be made for the

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punishment, Mr. Macaluso stated, "Let's divorce our thinking from those sorts of things and let's talk about a situation where one person knowingly or intentionally causes the death of another. . . . Let me ask you: What do you personally feel ought to be the minimum punishment for somebody committing a murder, sir?" *Id.* at 310. When the juror eventually answered, "I would say twenty years, I guess," the prosecutor asked him to confirm that twenty years would be his minimum sentence, then asked if he was stating that a sentence of five years could never be proper. *Id.* at 312-13. Despite the prosecutor's manipulative questioning, Mr. Bozeman eventually stated that he could consider a five-year sentence for murder if appropriate to the facts and circumstances of the case. *Id.* at 316.

This pattern of questioning on the minimum punishment issue repeated with African-American jurors Joe Warren, V.D. Vol. III:1543-58, Edwin Rand, V.D. Vol. IV:1814-29, and Wayman Kennedy, V.D. Vol. V:2193-2202.

training. *See id.* at 3253-56.

5. The prosecutors' proffered reasons for their peremptory challenges of black jurors were pretextual, in that they applied with equal or greater force to similarly-situated white jurors.

> In the courtroom, [Dallas County] prosecutors commonly exercise peremptory challenges against blacks who voice views and appear to possess qualifications similar to those of the whites selected for the jury.[7]

During Mr. Miller-El's trial, the prosecution offered reasons for their peremptory challenges of black jurors which were pretextual in that they applied with equal or greater force to similarly-situated white jurors. One of the most common reasons proffered by the prosecutors was the black jurors' alleged "hesitancy" to apply the death penalty. For example, Joe Warren, an African-American, was struck peremptorily by the State and, when asked, the prosecutor stated that he had struck Mr. Warren because of his "misgivings" and "mixed feelings" about the death penalty, and because he had indicated he did not agree with the death penalty in all cases. App. 2 at 11.[8]

Joe Warren was an excellent State's juror. He was a married, middle-aged veteran; he had three children; he volunteered for the PTA; he was a member of Crime Stoppers and other crimefighting programs; and he had managed the meat section at a Kroger supermarket for 19 and a half years. App. 14. He repeatedly affirmed that he believed in the death penalty and that he could serve on a capital jury and impose death in an appropriate case. V.D. Vol. III:1526, 1531, 1536-38. The record clearly reveals that, to the extent that Mr. Warren had any "misgivings"

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[7] App. 10, 11.

[8] In attempting to justify his peremptory strike, the district attorney also stated that he had struck Mr. Warren simply because he had a large number of peremptory strikes remaining at that point in the *voir dire*. Given the weakness of the State's other reasons for striking Mr. Warren, this final reason, which necessarily is dependent upon the other stated reasons, is facially insufficient.

about the death penalty, his sole concern was that the death penalty might be *too humane* for murderers.[9] Nevertheless, the Texas court and the federal magistrate judge both upheld the State's peremptory strike against Mr. Warren based on his "misgivings" and "mixed feelings" about the death penalty. App. 2 at 11; App. 5 at 18-19.

Hesitancy about the death penalty is a facially race-neutral reason for exclusion from jury service. However, it was selectively applied only against African-American jurors. Kevin Duke, who was seated as Juror Number 7, had expressed "misgivings" similar to those of Mr. Warren:

> I think you have to have the death penalty. I think sometimes it should be up to the person who is convicted because, if he's sentenced to life imprisonment, sometimes death would be better to me than – being in prison would be like dying every day and, if you were in prison for life with no hope of parole, I just [sic] as soon have it over with than be in prison for the rest of your life. If he's committed a crime like this that maybe he should be convicted of and put away, if he's not put away for life, that's – if he has no chance for parole, then I don't see the difference between death and life imprisonment. If there's a chance for parole, that's a different story, but I think you might as well go ahead and give the death sentence instead of life in prison because it's the same thing to me.

V.D. Vol. VIII:3264. Sandra Jenkins voiced similar sentiments, stating during the State's *voir dire*, "I think that a harsher treatment [than the death penalty] is life imprisonment with no parole." V.D. Vol. III:1074. The prosecutor failed to follow up on this remark, and voiced no objection to Ms. Jenkins serving on the jury. *Id.* at 1127. Clearly, the prosecution's stated

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[9] Mr. Warren stated that he had "mixed feelings" because "sometimes you feel that it might help to deter crime and then you feel that *the person is not really suffering*. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment." V.D. Vol. III:1532 (emphasis added). The prosecutor then asked further questions:

> Q. In other words, you feel under certain circumstances the death penalty would be bad, but being locked up in a cage would be a whole lot worse and be more punishment; is that what you're saying?
>
> A. Yes. In some cases you feel like maybe if the person were to suffer in some other way maybe.

Id.

concern about jurors' hesitations regarding capital punishment was reserved for African-American jurors.[10]

The use of the African-American jurors' alleged hesitancy to impose a death sentence was only one of the pretextual explanations offered by the State. As another example, the State struck some black jurors, such as Billy Jean Fields, for the purported reason that they had relatives with legal troubles. While this is a facially race-neutral reason which is supported by the record, it is patently pretextual, since several comparable pro-death penalty white jurors were not challenged by the State. Mr. Fields testified that his brother had been arrested and convicted for possession of a controlled substance, and had served time. V.D. Vol. I:435-36. A white juror, Noad Vickery, testified that his sister had been arrested and had served time in the penitentiary. V.D. Vol. IV:1601-02. Both men affirmed that they did not know many details. V.D. Vol. I:435-36; V.D. Vol. IV:1601-02.. Both men affirmed (Mr. Fields repeatedly, *see* V.D. Vol. I:443-

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[10] As argued extensively in the Fifth Circuit briefing, numerous other African-American jurors were struck, purportedly because of their reservations about the death penalty, despite their clear statements that they could serve on a capital jury and vote for a death sentence if appropriate. *See* COA at 56-65 (Billy Jean Fields), 76-78 (Edwin Rand), 78-82 (Roderick Bozeman), 82-85 (Carol Boggess), and 85-87 (Wayman Kennedy); Reply to Response in Opposition to Application for Certificate of Appealability ("Reply") at 7-9 (Boggess), 12-14 (Fields), 14-16 (Rand), 16-17 (Bozeman), and 17-18 (Kennedy).

By contrast, white jurors who expressed some reluctance to impose a death sentence were handled very differently by the prosecution. For example, Sandra Hearn repeatedly affirmed that she could *not* give the death penalty for a first offender in an ordinary capital murder case, "[r]egardless of what the facts are, regardless of what the circumstances are[.]" V.D. Vol. XI:4583-85. The prosecutor attempted to rehabilitate Ms. Hearn. She initially stated, "I do not think anyone should be sentenced to a death penalty on [a] first offense." V.D. Vol. XI:4541. The prosecutor replied that he "gather[ed]" from what Ms. Hearn was saying that she would require "a continuing course of criminal conduct" before voting for death. She agreed. *Id.* at 4541-42. The prosecutor then asked if the prior offenses could be something less than murder. When the juror responded that it would "be according to the situation," he suggested that she would "look at each individual case and each individual defendant" in order to render a decision. *Id.* at 4543. Ms. Hearn agreed, "Right." *Id.* However, upon further questioning, Ms. Hearn repeated her view that she could not give the death penalty for a first offense. *See id.* at 4583-85, 4600. Nevertheless, she was seated as Juror Number 12. The prosecution also accepted white jurors Noad Vickery and Gwendolyn Smale, although each had expressed reluctance to impose the death penalty. V.D. Vol. IV:1576-78 (Vickery); V.D. Vol. III: 1298, 1301 (Smale).

44) that the experience with their family members would not affect their judgment in Mr. Miller-El's case. V.D. Vol. I:435-36; V.D. Vol. IV:1601-02. The State, after hearing Mr. Vickery's account, accepted Mr. Vickery. V.D. Vol. IV:1635. After hearing Mr. Fields' virtually identical account, the State seized upon it as one reason to strike him. V.D. Vol. I:455.[11]

In short, Mr. Miller-El presented compelling evidence that the prosecutors manipulated the venire in an effort to exclude African-Americans from his jury. These efforts commenced with the shuffling of the fifty-member venires, *before* the lawyers had any information about the prospective jurors. These efforts persisted, in the form of disparate questioning and peremptory challenges, even *after* the prosecutors learned that many of the African-American venirepersons were very State-oriented jurors.

III. The courts below misapplied this Court's Equal Protection jurisprudence, which requires a factfinder, as part of the inquiry into the alleged discriminator's state of mind, to consider the strength of the inference of racial discrimination created by the *prima facie* case.

A. Under Equal Protection jurisprudence, an overwhelming *prima facie* case of discrimination remains relevant to a court's assessment of the motive behind a peremptory challenge.

In accordance with its written policy, which remained unaltered by this Court's *Swain* opinion, the Dallas County District Attorney's Office engaged in a pattern and practice of racial discrimination while selecting criminal juries at the time of Mr. Miller-El's trial. In case after case, they removed as many African-American jurors as possible – usually every single one – using peremptory challenges. Mr. Miller-El developed a compelling case that the discrimination

[11] This pattern repeats. Chatta J. Nix indicated that her brother was *currently on trial* as part of the I-30 construction scandal. V.D. Vol. V:2379. Moreover, Ms. Nix revealed that *she herself* had been "charged in a conspiracy case" relating to the I-30 scandal. *Id* at 2380. However, without even questioning her about this information, *see id.* at 2345-77 (reflecting that prosecution asked no questions on these subjects during *voir dire*), the State accepted her as a juror. *Id.* at 2399. Cheryl A. Davis's husband was convicted of theft in 1976, and received seven years' probation, which ended in 1983. V.D. Vol. IX:3469-70.

occurred during his trial.

To summarize the three-step inquiry created by *Batson v. Kentucky*, 476 U.S. 79 (1986), the defendant must first make a *prima facie* showing that the prosecution exercised its peremptory challenges based on race. "Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Id.* at 97. Finally, if the first two steps are satisfied, the court must determine whether the defendant has carried his ultimate burden of proving purposeful discrimination. Although the burden of production shifts during this inquiry, the burden of proof on the ultimate issue of discrimination always rests with the defendant. *Purkett v. Elem*, 514 U.S. 765, 768 (1995). This burden-shifting process is common to all inquiries into racial discrimination, whether in criminal cases or in the Title VII context.

In *Swain v. Alabama*, 380 U.S. 202 (1965), this Court first applied the burden-shifting framework to the issue of racial discrimination in the use of peremptory challenges. In a portion of the opinion now superseded by this Court's decision in *Batson*, the Court held that a defendant could make out a *prima facie* case of racial discrimination only by demonstrating that the prosecution had removed jurors "consistently and systematically." *Id.* at 222. If he met this challenge, his proof would create "a fair inference of discrimination . . . which is determinative absent sufficient rebuttal evidence." *Id.* at 227 (emphasis added).

In *Batson*, this Court modified the first step of the burden-shifting inquiry by holding that a defendant could establish a *prima facie* case of discrimination by demonstrating disproportionate exclusion of jurors in his own case. The Court left unchanged the balance of the three-step burden-shifting analysis, and in fact emphasized that a very strong *prima facie* case – one that showed "total or seriously disproportionate exclusion of Negroes from jury venires" – could create an inference of discrimination strong enough to, "for all practical purposes,"

demonstrate discrimination. *Batson*, 476 U.S. at 94 (citations omitted).

The Court's approach in the *Batson* context drew on its Title VII jurisprudence,[12] which had always treated the inquiry into discrimination as a practical assessment of the alleged discriminator's motives. Such an assessment requires consideration of all relevant evidence, including the strength of the *prima facie* case of discrimination. This Court, in a unanimous opinion, recently observed:

> Although the presumption of discrimination [created by the prima facie case] "drops out of the picture" once the defendant meets its burden of [producing race-neutral reasons for its decision], the trier of fact may still consider the evidence establishing the plaintiff's prima facie case "and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual."

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000) (citation omitted); *see id.* at 147 ("The factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination." (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)).

In *Hernandez v. New York*, 500 U.S. 352 (1991), a plurality of this Court endorsed the notion, specifically in the context of peremptory strikes, that a very strong *prima facie* case of racial exclusion can make a state actor's asserted race-neutral motives "simply too incredible" to be believed. *Id.* at 369. Concurring, Justice O'Connor joined by Justice Scalia, also emphasized that the strength of the *prima facie* case of discrimination is relevant in assessing the credibility of the prosecutor's proffered reasons for his challenges: "Disproportionate [strikes of African-American jurors] may, of course, constitute evidence of intentional racial discrimination. The trial court may, because of such effect, disbelieve the prosecutor and find that the asserted justification is merely a pretext for intentional race-based discrimination." *Id.* at 375 (citing *Batson*, 476 U.S. at 93). Some lower courts take it as a given that the third step of the *Batson* inquiry is vital, and

[12] *See Batson*, 476 U.S. at 94 n.18.

that it requires a consideration of all relevant evidence, including the defendant's *prima facie* case.[13]

B. The courts below held that all of the facts establishing Mr. Miller-El's compelling *prima facie* case were irrelevant to the ultimate issue of whether the State in fact engaged in racial discrimination.

The departure from this Court's Equal Protection jurisprudence – as well as that of the Second, Sixth, Seventh, and Ninth Circuits – started with the Magistrate Judge's opinion, which was by far the most detailed treatment of Mr. Miller-El's claim in any of the courts below, and was the basis for the district court's denial of Mr. Miller-El's petition. Although the Magistrate Judge correctly recited *Batson*'s mandate to consider the "totality of the evidence," the Magistrate Judge repeatedly and explicitly found that Mr. Miller-El's *prima facie* case was not relevant in assessing the prosecution's race-neutral reasons or deciding the ultimate question. For instance, the Magistrate Judge refused to consider proof that the prosecutors who selected Mr. Miller-El's jury had been cited for racial discrimination in other cases because such evidence was

[13] *See, e.g., Coulter v. Gilmore*, 155 F.3d 912, 920 (7th Cir. 1998) ("The *Batson* decision makes it clear that, one way or another, a trial court must consider all relevant circumstances before it issues a final ruling on a defendant's motion." (citing *Batson*, 476 U.S. at 96-97)); *United States v. Alvarado*, 951 F.2d 22, 26 (2d. Cir. 1991) ("In deciding the ultimate issue of discriminatory intent, the judicial officer is entitled to assess each [purportedly race-neutral] explanation in light of *all the other evidence* relevant to prosecutorial intent." (emphasis added)). The Sixth Circuit explained the process clearly:

> At th[e third] step of the analysis, the district court has the responsibility to assess the prosecutor's credibility under all of the pertinent circumstances, and then to weigh the asserted justification *against the strength of the defendant's prima facie case* under the totality of the circumstances. Thus, even though the issue of whether the defendants made out a prima facie case is moot for purpose of deciding whether they met their burden of production at step one, the district court may still assess the *totality of the circumstances* surrounding the strike in the analysis of whether the defendants have met their ultimate burden of proving purposeful discrimination.

United States v. Hill, 133 F.3d 337, 342 (6th Cir. 1998) (emphases added) (citing *Hernandez*); *see also Alvarado*, 951 F.2d at 26 ("As with most inquiries into state of mind, the ultimate determination depends on an aggregate assessment of all the circumstances.").

"only relevant in determining whether a petitioner has established a *prima facie* case under *Batson*." App. 5 at 12-13. The Magistrate Judge likewise brushed aside the historical and statistical evidence of Dallas County's discriminatory practices, because it "only helps him establish a *prima facie* case of discrimination." *Id.* at 21.

After refusing to consider the *prima facie* case, the Magistrate Judge evaluated the purportedly race-neutral reasons advanced by the prosecution. He found one of the reasons advanced by the prosecutor – that African-American jurors had indicated hesitation about the death penalty – to be a race-neutral reason. App. 5 at 14-21. The Magistrate Judge did not address the fact that the prosecution had also advanced other purportedly race-neutral reasons that were clearly pretextual,[14] nor did he take into account the prosecution's attempt to manipulate the jury shuffle, which occurred *before* the prosecutor knew anything about the jurors other than their appearance.

The Magistrate Judge discounted the disparate questioning of African-American jurors as irrelevant to "the relevant inquiry in this case [which] is whether the race-neutral explanations proffered by the state for its use of peremptory challenges were pretextual." App. 5 at 13-14.

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[14] Mr. Miller-El argued that the provision of demonstrably false reasons for a peremptory challenge undercuts the prosecutor's credibility as to any remaining reasons. For instance, the prosecution claimed that it had struck a conservative, middle-aged, pro-death penalty African-American juror named Billy Jean Fields because he was a member of the Roman Catholic Church, whose teachings call for strict limitations on capital punishment. Mr. Miller-El demonstrated that the prosecution had permitted non-African-American Roman Catholics to serve on the jury, and often never even asked those jurors whether the teachings of their church would affect their jury service. Amend. Pet. at 129-31 n.51. Likewise, Mr. Miller-El demonstrated that the prosecutor's reason for striking several other African-American jurors – that they were related to people who had legal problems – was unquestionably false, since the prosecution rarely questioned non-African-American jurors on this topic and never struck a non-African-American juror on this basis. Amend. Pet. at 120-27; *see supra* at 17. The Magistrate Judge ignored Mr. Miller-El's argument that the fact that the prosecution had provided some unquestionably false reasons for its strikes undermined its credibility by showing that it was searching for facially neutral reasons to justify a decision that was truly motivated by racial bias. *See, e.g., United States v. Chinchilla*, 874 F.2d 695, 699 (9th Cir. 1989) (although prosecutor had advanced two "adequately 'neutral' explanations taken at face value, the fact that two of the four [other] proffered reasons do not hold up under judicial scrutiny" casts fatal doubt on prosecutor's credibility).

Any evidence of the prosecutor's "motivation" beyond the specific reasons for his peremptory challenges, the Magistrate Judge held, was "simply irrelevant." *Id.* at 13. Thus, even though the prosecutor's racially disparate questioning might have indicated that he was "of a mind to discriminate," it could be dismissed because (1) the prosecutors did not succeed in any of their frequent attempts to exclude African-American jurors for cause based on their responses to the disparate questioning; and (2) when the prosecutors advanced race-neutral reasons for their peremptory challenges, they did not cite the jurors' responses to the disparate questioning. *See* App. 5 at 13-14.[15] By focusing narrowly on whether the disparate questioning directly led to the removal of any jurors, the Magistrate Judge missed its true import. Whether the state successfully removed any African-American jurors using this method is less important than the mere fact that they were *attempting to do so in the first place*.

The Magistrate Judge concluded that there was "considerable" evidence that the Dallas County District Attorney's Office had an "unofficial policy" of excluding African-Americans from juries and that there was "no other explanation for the appalling statistics brought to light" in the 1986 *Dallas Morning News* study. App. 5 at 20. Likewise, he characterized as "disturbing" the manual that "taught Dallas County prosecutors to strike prospective jurors on the basis of race, religion, ethnicity and gender." *Id.* But after he confined the relevance of this "appalling" and "disturbing" evidence to the first stage of the *Batson* inquiry, the Magistrate Judge held that the state court's rejection of Mr. Miller-El's *Batson* claim was not unreasonable.

The District Court, over Mr. Miller-El's objection, upheld the Magistrate Judge's approach in a short portion of a six-page Order: "[Because] an inference of purposeful

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[15] The fact that the prosecutors did not cite the jurors' responses to the minimum-punishment issue as a reason for their peremptories strengthens Mr. Miller-El's case. It suggests that the prosecution raised the minimum-punishment issue not out of concern for potential (pro-State) bias, but solely as a pretext to exclude African-American jurors.

discrimination had already been found by the Court of Criminal Appeals, . . . further discussion of the evidence in support of the *prima facie* case was unnecessary [to an assessment of the prosecutor's race-neutral reasons]." App. 6 at 4. A panel of the United States Court of Appeals for the Fifth Circuit cursorily rejected Mr. Miller-El's argument that established Equal Protection jurisprudence required it to weigh the prosecutor's proffered race-neutral reasons against the strength of the *prima facie* case at the third step of the *Batson* inquiry. The panel reasoned that when this Court partially overruled *Swain* in *Batson*, it rejected *Swain*'s suggestion that the prosecutor's proffered race-neutral reasons should be subject to more stringent scrutiny when the defendant's *prima facie* case was particularly strong.[16] Then, "without commenting on each of the jurors and the reasons proffered for their being excluded," the Court of Appeals held that "[t]he findings of the state court that there was no disparate questioning of the *Batson* jurors and that the prosecution's reasons for striking the jurors was their reluctance to assess and/or their reservations concerning the death penalty are fully supported by the record." *Miller-El v. Johnson*, 261 F.3d at 452. The Court of Appeals did not address the apparent conflict between this statement and the approach of the Magistrate Judge, who had acknowledged that jurors had been questioned in a racially disparate manner.

C. Decisions like those of the courts below will effectively insulate discriminatory practices from review by confining even staggering evidence of purposeful discrimination to the first step in the *Batson* inquiry.

Deciding the ultimate issue of discrimination is "sensitive and difficult."[17] This Court has

[16] The lower court referred to the "rebuttal stage of the evidentiary formulation of *Swain*," erroneously taking Mr. Miller-El to argue that a particularly strong *prima facie* case required the prosecution to advance something *more convincing than a race-neutral reason* at stage two of the burden-shifting inquiry in order to avoid an immediate finding of discrimination. *Miller-El v. Johnson*, 261 F.3d at 451.

[17] *United States Post. Serv. v. Aikens*, 460 U.S. 711, 716 (1983).

warned lower courts against distorting the three-step burden-shifting inquiry – a "sensible, orderly way to evaluate evidence [of discrimination] in light of common experience" – by applying it in a "rigid, mechanized, or ritualistic" way.[18] The lower courts did not heed this warning. The lower courts erroneously proceeded on the assumption that the *prima facie* case "drops out of the picture" *for all purposes* once the State advances race-neutral reasons for its peremptory challenges.

In fact, the *prima facie* case, which in this case included evidence of a pattern and practice of intentional racial discrimination, is relevant to the issue of whether the prosecutor's proffered race-neutral reasons withstand scrutiny at the third phase of the *Batson* inquiry. The strength of the *prima facie* case helps determine the level of scrutiny to be applied to the proffered race-neutral reasons. Thus, an actor who stands indicted by a particularly formidable *prima facie* case will face greater scrutiny during the third, determinative stage, at which a court will weigh the totality of the evidence.

The approach of the courts below also frustrates the sensible scheme of incentives created by this Court's discrimination precedents. A useful analogy can be drawn to Title VII cases. When an individual plaintiff complains of one specific instance of discrimination, he bears the burden of proof, and must overcome the assumption that the employer's actions were lawful. Where a class of plaintiffs establishes that a company engaged in a "pattern or practice" of discrimination, that is, that "racial discrimination was the company's standard operating procedure – the regular rather than the unusual practice" – any member of the class is then presumed to have been discriminated against. *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875-76 (1984) (quoting *Teamsters v. United States*, 431 U.S. 324, 336 (1977) (footnote omitted)). Mr.

[18] *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978); *see also Aikens*, 460 U.S. at 716 (noting that excessive focus on procedural structure makes inquiry into the actor's state of mind "even more difficult" than it already is).

Miller-El proved that racial discrimination was the "standard operating procedure" not only of the District Attorney's office which tried him, but also the *individual prosecutors responsible for picking his jury*. Neither at the time of Mr. Miller-El's trial nor at any subsequent proceeding did the State demonstrate, or even try to demonstrate, that the pattern and practice of discrimination it followed had ended by the time of Mr. Miller-El's trial. Indeed, Mr. Miller-El cited many cases of intentional racial discrimination by Dallas Country prosecutors *after* Mr. Miller-El's trial, including one case involving one of the prosecutors who tried Mr. Miller-El. Amend. Pet. at 46-60; COA at 26-30.

A *Batson* claim is an individual-instance claim, and the burden of proof therefore never shifts to the prosecution no matter how strong the *prima facie* case. However, as the discussion above shows, a court must subject the prosecutor's strike reasons to more searching scrutiny at the *third* stage of the *Batson* inquiry when the defendant has proven a "pattern and practice" of racial discrimination at the first stage. This requirement is not only in harmony with the three-step procedure set out under *Batson*, it is actually part of it. *See Purkett v. Elem*, 514 U.S. at 768 (noting that the third step of the *Batson* inquiry is the proper time to evaluate the "persuasiveness" of the prosecution's proffered race-neutral reasons and, in light of the record as a whole, determine the ultimate issue of whether the defendant has carried his burden of proving discrimination).

Under the Fifth Circuit's approach, by contrast, the scrutiny applied to the prosecution's race-neutral reasons at the third step of the inquiry remains the same regardless of the strength of the *prima facie* case. A defendant who shoulders the burden of gathering significant additional evidence of discrimination cannot convince the court to scrutinize the prosecutor's race-neutral reasons more carefully, because his additional direct or circumstantial *prima facie* evidence of discrimination will be set aside as "irrelevant" when the court weighs the sufficiency of the

prosecution's strike justifications.

Both the lower court in *Purkett* and the lower courts here slighted step three of the *Batson* inquiry. In *Purkett*, the lower court failed to perform a step three analysis of the prosecutor's reasons because it assigned the prosecutor an erroneously high burden of proof at step two. Here, the lower courts misapplied this Court's precedents by confining the relevance of Mr. Miller-El's *prima facie* case – which established an uncontested pattern and practice of intentional racial discrimination – to step one of the analysis. This approach crippled their ability to assess the "genuineness" of the prosecutor's asserted motivations in light of the totality of the evidence. *Purkett*, 514 U.S. at 769.

The Fifth Circuit's approach unconstitutionally limits the judiciary's ability to combat racial discrimination. Rarely – if ever – has a *Batson* movant assembled a *prima facie* case that includes undisputed evidence of a long history of explicit discrimination, court findings linking the prosecutors who tried his case to other acts of intentional discrimination, training materials openly urging prosecutors to remove minorities, contemporaneous statistical evidence of gross racial disparities, *and* a clear pattern of race-conscious and racially disparate treatment of potential jurors in his case. If a *prima facie* case such as Mr. Miller-El's can be defeated by one unconvincing race-neutral explanation, it is difficult to imagine how *any* defendant could prevail in a *Batson* challenge, short of extracting a confession of discriminatory intent from the prosecutor. And, in fact, the Fifth Circuit has apparently never published a decision granting relief in a *Batson* challenge to the prosecution's use of peremptory challenges.[19] The decision below severely damages a powerful incentive to comply with constitutional standards, and can thus only be

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[19] The Court did grant relief to a defendant who claimed that counsel for his co-defendant had deployed his peremptory challenges in a discriminatory manner. *United States v. Huey*, 76 F.3d 638 (5th Cir. 1996). In that case, the lawyer had explicitly advised the judge that he wanted to remove all minority jurors because he felt they would be offended by tape recordings in which his client used ethnic stereotypes. *Id.* at 639.

regarded as a setback in the struggle to rid the American criminal justice system of racial discrimination.

Conclusion

This case presents a simple question: should Mr. Miller-El's unusually compelling *prima facie* case be considered and assessed at the third step of the discrimination inquiry, which requires the reviewing court to weigh the totality of the evidence against the credibility of the prosecutor's race-neutral explanations? The answer to this question provided by this Court's discrimination jurisprudence is "yes." Because the courts below repeatedly and explicitly discounted the relevance of Mr. Miller-El's *prima facie* case to the ultimate issue of discrimination, their reasoning fundamentally conflicts with decisions of this Court and with other lower courts. *See* SUP. CT. R. 10(c). This Court should grant the writ of certiorari not only to ensure meaningful and uniform enforcement of constitutional guarantees, but also to prevent the unseemly spectacle of an inmate being denied any legal remedy – and being executed – after a trial so obviously tainted by intentional racial discrimination.

ISSUE TWO

THIS COURT SHOULD GRANT *CERTIORARI* TO CLEAR UP CONFUSION AMONG THE FEDERAL COURTS AS TO WHEN TO APPLY 28 U.S.C. § 2254(d)(2) OR § 2254(e)(1) TO STATE COURT FACTFINDINGS, AND TO ADDRESS WHETHER THE AEDPA REQUIRES A PETITIONER TO DEMONSTRATE THE "UNREASONABLENESS" OF A STATE COURT'S DETERMINATION OF FACTS BY CLEAR AND CONVINCING EVIDENCE.

There is widespread confusion in lower courts regarding how and when to apply 28 U.S.C. § 2254(d)(2)[20] and 28 U.S.C. § 2254(e)(1),[21] both of which address federal court treatment of state court findings of fact. Section 2254(e)(1) retains the traditional presumption of correctness and requires that petitioners affirmatively prove, by clear and convincing evidence, that state court factfindings are incorrect. Section 2254(d)(2), however, directs federal courts to independently assess the "reasonableness" of the state court's "determination" of outcome-determinative factfindings. In an opinion emblematic of the muddled jurisprudence that has emerged since the passage of the Antiterrorism Act of 1996,[22] the court below merged the language of the two provisions into one extraordinarily deferential standard of review and – contrary to § 2254(d)(2)'s mandate – refused to examine the serious flaws and irregularities that rendered the state court factfinding process "unreasonable."

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[20] "An application for a writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

[21] "[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

[22] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 ("AEDPA").

I. The Fifth Circuit incorrectly merged § 2254(d)(2) and § 2254(e)(1) and required Mr. Miller-El to prove the unreasonableness of the state court determinations of fact by clear and convincing evidence.

In addressing Mr. Miller-El's claims for relief, the Fifth Circuit combined the two standards in § 2254(d)(2) and § 2254(e)(1):

> As an appellate court reviewing a federal habeas petition, we are required . . . to presume the state court findings correct unless we determine that [they] resulted in a decision which is unreasonable in light of the evidence presented. *And the unreasonableness, if any, must be established by clear and convincing evidence.*

Miller-El v. Johnson, 261 F.3d at 451 (emphasis added); *see also id.* at 454 (same). Thus, instead of conducting an independent review of the reasonableness of the state court's "determination" of the decisive fact issues, the lower court constructed an ultra-deferential presumption of correctness.[23] Subsequently, and without discussion of the profound defects in the process by which the state court determined the facts, the court simply recited the state court factfindings and deferred to them. *Id.* at 452, 454 ("A state court's competency determination is a finding of fact entitled to a presumption of correctness under § 2254(d)(2).").

Of all the potential approaches to the statutory construction problem posed by the two provisions, combining § 2254(d)(2) and § 2254(e)(1) is the least tenable. First, requiring a petitioner to prove "unreasonableness" by "clear and convincing evidence" results in a standard of review so extravagantly generous to the state courts – and one that is far more imposing than either of the standards in § 2254(d)(2) or § 2254(e)(1) – as to effectively insulate state factfindings from federal review. Second, because the court nullified § 2254(d)(2)'s imperative to examine the reasonableness of the state court's "determination" of the facts, it violated the "cardinal principle" of statutory construction requiring courts to "give effect, if possible, to every

[23] The Magistrate Judge similarly concluded that, "any defects in the state habeas proceeding were immaterial," because the state court factfindings are presumed correct. App. 5 at 37.

clause and word of a statute." *(Terry) Williams v. Taylor*, 529 U.S. 362, 404 (2000) ("It is . . . a cardinal principle of statutory construction that we must 'give effect, if possible, to every clause and word of a statute.'" (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)) (internal quotation marks omitted). Just as this Court declined to adopt Justice Stevens' interpretation of § 2254(d)(1) because it failed to "give independent meaning to both the 'contrary to' and 'unreasonable application' clauses" of the provision,[24] it should prevent the lower courts from reading any independent significance out of § 2254(d)(2). Congress would hardly have enacted the new 28 U.S.C. § 2254(d)(2) alongside the already-existing language concerning the presumption of correctness found in § 2254(e)(1) unless § 2254(d)(2) was intended to add something new. Similarly, Congress could easily have combined the two different standards into one provision (as the court effectively did), but chose not to do so.

II. This Court should resolve the inherent tension between § 2254(d)(2) and § 2254(e)(1) and accord each provision independent significance.

A. There is an inherent tension between § 2254(d)(2) and § 2254(e)(1).

The two separate provisions in 28 U.S.C. § 2254 which address the effect of state-court factfindings on federal habeas corpus review are facially inconsistent. Section 2254(e)(1) mandates that state court factfindings "shall be presumed to be correct" absent a showing to the contrary "by clear and convincing evidence." Section 2254(d)(2), on the other hand, requires federal courts to assess the reasonableness of the state court's determination of the facts in light of the evidence before the state court. In other words, § 2254(d)(2) explicitly instructs federal courts to look past the state court factfinding itself and inquire whether the determination of the fact was reasonable in light of the record. Thus, there is an inherent tension between these two provisions because they require that federal courts both: (1) presume state court's factual

[24] *(Terry) Williams v. Taylor*, 529 U.S. at 404.

conclusions are correct unless a petitioner comes forward with clear and convincing evidence that rebuts them; and, (2) examine the quality of the state court's work in reaching its factual conclusions.[25]

B. The evident tension between § 2254(d)(2) and § 2254(e)(1) is resolved by considering each provision within its appropriate context.

Section 2254(e) regulates fact development and the operation of the presumption of correctness in federal habeas corpus proceedings. Federal courts are required to presume that state court factfindings are correct unless the petitioner produces clear and convincing evidence rebutting them. On the other hand, § 2254(d)(2) is a limitation on a federal court's ability to grant a writ of habeas corpus once it has found a constitutional violation, like § 2254(d)(1).[26] Section 2254(d)(2) directs a federal court to scrutinize what the state court did with the evidence before it, and allows for habeas relief when the state court's decision resulted from an objectively unreasonable determination of the facts.

Thus, § 2254(e)(1) requires that a federal court presume that the state court factfindings are correct, but gives the petitioner the opportunity to come forward with *additional* evidence rebutting the presumption clearly and convincingly. This may happen when the state court record is incomplete through no fault of the petitioner, perhaps because the petitioner's ability to investigate in state court was hindered. *(Michael) Williams v. Taylor*, 529 U.S. 240 (2000). If the petitioner meets this burden, then federal court review of his claims that rely upon the new

[25] *See* JAMES S. LIEBMAN, RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 20.2(c), at 751 (3d ed. 1998) ("On first reading, section 2254(d)(2)'s provision for habeas corpus *relief* . . . appears to be contradicted by section 2254(e)(1)'s attachment of a strong, typically *relief barring*, presumption of correctness to (apparently any) 'determination of a factual issue made by a State court.'") (emphasis in the original).

[26] *(Terry) Williams v. Taylor*, 529 U.S. at 412 ("§ 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court.").

facts is unencumbered by any deference to the state court decision.

However, when the state court record is complete, and the petitioner's challenge to the state court decision is based on that court's outcome-determinative factual determinations, the analysis should proceed under § 2254(d)(2). At this point, § 2254(e)(1) notwithstanding, § 2254(d)(2) contemplates that a federal court will evaluate the state court record[27] and grant relief if (1) the petitioner has demonstrated a constitutional violation; and (2) the state court denied relief based on an "unreasonable determination" of the facts in light of the evidence before it. Because "unreasonable" modifies "determination," a federal court must examine how the state court "determined" the facts – *i.e.* how the state court "[came] to a decision . . . by investigation, reasoning, or calculation."[28] This inquiry necessarily focuses not just on the factfindings themselves, but also on the *manner* in which the state court arrived at the facts, and whether it was reasonable. Indeed, the decisions of some lower courts applying § 2254(d)(2), in accordance with the plain language of the provision, analyze both the process by which the state court

[27] In *Beck v. Bowersox*, 257 F.3d 900, 901 (8th Cir. 2001), the court of appeals reversed and remanded the case to the district court because a transcript of the state court proceedings relevant to Beck's claim was not filed with the federal court. The Eighth Circuit noted that § 2254(d)(2) and § 2254(e)(1) impose "difficult standards for the habeas petitioner to overcome. *But they require meaningful federal court review of the evidentiary record considered by the state courts.*" *Id.* (emphasis added).

[28] See Merriam-Webster Online Dictionary (http://www.m-w.com/cgi-bin/dictionary).

determined the facts[29] and the substantive content of those findings.[30]

III. Without guidance from this Court, the confusion among the lower federal courts will continue to lead to inconsistent treatment of state court factfindings depending on whether a court chooses to apply § 2254(d)(2) or § 2254(e)(1).

The lack of guidance in the AEDPA itself, or from this Court, has spawned confusion in the lower courts regarding when and how to apply § 2254(d)(2) and § 2254(e)(1), as well as how the provisions intersect analytically. *See Green v. White*, 232 F.3d 671, 672 n.3 (9th Cir. 2000) ("As an analytical matter, the relationship between § 2254(d)(2) and § 2254(e)(1) is not entirely clear. Both appear to address state court factual findings."); *Leka v. Portuondo*, 76 F.Supp.2d 258, 276-77 (E.D.N.Y. 1999), *rev'd on other grounds*, 257 F.3d 89 (2nd Cir. 2001) (noting the lack of guidance on the issue and describing differing approaches to reconciling § 2254(d)(2) and § 2254(e)(1)).

The Ninth Circuit has held that demonstrating that the state court factual determinations were unreasonable pursuant to § 2254(d)(2) negates the presumption of correctness.[31] The First

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[29] *Paxton v. Ward*, 199 F.2d 1197, 1210-11 (10th Cir. 1999) (state court's "factually incorrect description of the evidence" resulted in an unreasonable determination of the facts); *Green v. White*, 232 F.3d 671, 672 (9th Cir. 2000) (trial court abdicated its factfinding responsibility to the appeals court); *Torres v. Prunty*, 223 F.3d 1103, 1109 (9th Cir. 2000) (state court factfinding procedure inadequate because the court refused to order a competency hearing). *See also Valdez v. Cockrell*, ___ F.3d ___, 2001 WL 1530153, at *21 (5th Cir. Dec. 3, 2001) (Dennis, J., dissenting) ("In the present case, the state habeas judge did not read the trial transcript, thus depriving Valdez of a full and fair hearing. In light of this failure, it is disingenuous to conclude that the state court rendered a decision that was based on a reasonable 'determination of the facts in light of the evidence presented' and is therefore entitled to deference.").

[30] *See Gunn v. Ignacio*, 263 F.3d 965, 970 (9th Cir. 2001) ("We have the evidence presented in the state court proceeding in the record before us. We have searched with great care for any words in the sentencing hearing that support the determination [of fact by the state court] . . . . We cannot find any.").

[31] *Torres v. Prunty*, 223 F.3d at 1110 n.6 ("In deciding, as we have, that the state courts' factual determinations were unreasonable within the meaning of § 2254(d)(2), we have decided, of necessity, that on the existing record Torres has rebutted the 'presumption of correctness' of those findings 'by clear and convincing evidence.'").

Circuit, however, has held that after a habeas petitioner offers evidence that overcomes the presumption of correctness, it will then determine whether the proffer convinces the court that the state court decision was based on an unreasonable determination of the facts in light of the evidence presented to the state court.[32] The same approach is evident in a recent decision by a district court in that circuit. *See Dias v. Maloney*, 156 F. Supp. 2d 104, 123 (D. Mass. 2001) ("a petition for habeas corpus cannot be granted on the basis of section 2254(d)(2) unless the federal court first holds that the state court's factual determinations were incorrect pursuant to section 2254(e)(1)").

Many courts simply gloss over the tension by reading the two provisions as interchangeable, thus rendering either § 2254(e)(1) or § 2254(d)(2) superfluous.[33] The Fifth Circuit has applied the provisions in an apparently random manner in seemingly identical situations. Some panels of the Fifth Circuit have relied exclusively on § 2254(d)(2)'s "unreasonable determination" standard when evaluating state court factfindings. That is, they required petitioners to overcome the presumption of correctness afforded to state court factfindings by showing that the state court decision was based on an "unreasonable determination" of the facts in light of the evidence presented.[34] Other panels of the same court

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[32] *Sanna v. DiPaulo*, 265 F.3d 1, 10 (1st Cir. 2001) ("a habeas petitioner can rebut [the] presumption [of correctness] by adducing 'clear and convincing evidence,' 28 U.S.C. § 2254(e)(1), and a federal habeas court will issue the writ if this proffer convinces it that the underlying state court's adjudication 'resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,' *id.* § 2254(d)(2).").

[33] *McGhee v. Yukins*, 229 F.3d 506, 509 (6th Cir. 2000) ("We defer to the state court's factual conclusions unless they are based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. 2254(d)(2)."); *Ashker v. Class*, 152 F.3d 863, 867 (8th Cir. 1998) ("Mr. Ashker's citations of testimony . . . do not, in our view, provide the 'clear and convincing' evidence necessary to overcome the presumption of correctness that the law assigns to those findings. See 28 U.S.C. § 2254(e)(1); see also 28 U.S.C. § 2254(d)(2)").

[34] *Gardner v. Johnson*, 247 F.3d 551, 557 (5th Cir. 2001); *Tucker v. Johnson*, 242 F.3d 617, 621 (5th Cir. 2001); *Moore v. Johnson*, 225 F.3d 495, 504 (5th Cir. 2000); *Chambers v. Johnson*, 218 F.3d

rely exclusively on § 2254(e)(1).[35] These cases do not mention the "unreasonable determination" standard, but instead suggest that the presumption of correctness can be overcome only by a "clear and convincing" showing of the incorrectness of specific factfindings. In both sets of cases, the choice of standards is simply announced with no explanation of why it is suited to the case at hand. Nor do the factual settings of the various cases provide discernible clues as to why a particular panel chose one standard over the other.

Recently, a panel of the Fifth Circuit split over the proper manner in which to harmonize § 2254(d)(2) and § 2254(e)(1)[36] – though neither the majority's nor the dissent's construction

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360, 363 (5th Cir. 2000); *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000).

[35] *Rudd v. Johnson*, 256 F.3d 317, 319 (5th Cir. 2001); *Caldwell v. Johnson*, 226 F.3d 367, 372 (5th Cir. 2000); *Barrientes v. Johnson*, 221 F.3d 741, 774 (5th Cir. 2000); *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000).

[36] *Valdez*, 2001 WL 1530153, at *7 n.17. The *Valdez* majority stated:

> [T]here is an easier way to harmonize § 2254(d)(2) and § 2254(e)(1). Whereas § 2254(d)(2) sets out a general standard by which the district court evaluates a state court's specific findings of fact, § 2254(e)(1) states what an applicant will have to show for the district court to reject a state court's determination of factual issues. For example, a district court may find by clear and convincing evidence that the state court erred with respect to a particular finding of fact, thus rebutting the presumption of correctness with respect to that fact. See § 2254(e)(1). It is then a separate question whether the state court's determination of facts was unreasonable in light of the evidence presented in the state court proceeding. See § 2254(d)(2). Thus, it is possible that, while the state court erred with respect to one factual finding under § 2254(e)(1), its determination of facts resulting in its decision in the case was reasonable under § 2254(d)(2).

Id. The dissent, after noting that the question is unsettled, argued that a finding of an unreasonable determination of the facts rendered the presumption of correctness inoperable:

> *Although the courts have not made it clear how § 2254(d)(2)'s "invitation to decide whether the state fact determinations were reasonable . . . fit[s] with the presumption that the state fact determinations are correct,"* leading scholars contend that reading § 2254(d)(2) and § 2254(e)(1) in *pari materia* yields results similar to those reached when § 2254(d) explicitly provided that the denial of a full and fair hearing defeated the presumption of correctness.

resembled the one applied to Mr. Miller-El's claims.

There is even confusion as to the effect of satisfying the § 2254(d)(2) inquiry. Acknowledging, but disagreeing with, Justice Stevens' concurring opinion in *Williams v. Taylor*,[37] a panel of the Second Circuit has concluded that the "negative constraint on the authority of a federal habeas corpus court [contained in § 2254(d)(2)] does not necessarily carry the affirmative implication that whenever a state court adjudication is based on 'an unreasonable determination of the facts in light of the evidence,' the writ should issue." *Francis v. Stone*, 221 F.3d 100, 115 (2d Cir. 2000). Other courts have held that a habeas petitioner is entitled to relief if he demonstrates that a state court decision is based on an unreasonable determination of the facts in light of the evidence.[38]

This Court should grant *certiorari* to resolve the tension between § 2254(d)(2) and § 2254(e)(1) and end the confusion in the lower courts.[39]

IV. The Fifth Circuit's review of Mr. Miller-El's competency-to-stand-trial and *Batson* claims pursuant to § 2254(d)(2) was unduly deferential because the court refused to consider the unreasonable manner in which the state court ascertained the outcome-determinative issues of fact.

Pursuant to § 2254(d)(2), Mr. Miller-El argued that the state court denial of his claims that the trial court should have conducted a competency hearing *sua sponte*, and that he was in

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Id. at 21 (Dennis, J., dissenting) (quoting CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4265.2 (2d ed. & Supp. 2001)) (emphasis added) (footnotes omitted).

[37] 529 U.S. 362, 386 (2000) (Stevens, J., concurring) (28 U.S.C. § 2254(d)(2) "provides for the habeas remedy when a state-court decision 'was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.'" (emphasis omitted)).

[38] *Gunn v. Ignacio*, 263 F.3d at 971; *Torres v. Prunty*, 223 F.3d at 1110; *Green v. White*, 232 F.3d at 672.

[39] *See Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S.Ct. 1678, 1682 (2001) ("We granted the petition to resolve confusion among the Courts of Appeals"); *Burlington Industries, Inc., v. Ellerth*, 524 U.S. 742, 763 (1998) (noting the "tension which . . . has caused so much confusion among the Courts of Appeals").

fact incompetent to stand trial, resulted from an unreasonable determination of the facts in light of the evidence presented to the state courts. Mr. Miller-El's argument is based on both the procedural and substantive "reasonableness" of the state court determinations of fact during state habeas corpus proceedings.

Mr. Miller-El proffered medical and jail records which demonstrated the severity of his condition, as well as evidence that the trial court requested evaluations of his condition on three separate occasions. Amend. Pet. at Exhibits 18, 21-24. Mr. Miller-El also proffered the affidavit of Dr. Ari Kiev, which contained his impressive credentials as both a doctor and a lawyer, an inventory of the records he reviewed (which included all of Mr. Miller-El's medical records), and his expert opinion that Mr. Miller-El was incompetent to stand trial according to the correct legal standard. Amend. Pet. at Exhibit 19.

In response, the State submitted the affidavit of Dr. Steven Bowers. Amend. Pet. at Ex. 25. The Bowers affidavit contained no information about his education, background, or training, except that he was the medical director of the Dallas County Jail. The affidavit failed to indicate whether he was in fact a physician. The inventory of materials reviewed by Bowers did not include all of Mr. Miller-El's medical records; specifically excluded were the hospital records detailing Mr. Miller-El's injuries and extended treatment in Houston, and the records relating to his hospitalizations in Dallas during trial. Finally, the Bowers affidavit recited an incorrect standard for competency to stand trial before declaring that Mr. Miller-El was competent.

The state court abdicated its factfinding authority to the State when – after Mr. Miller-El's repeated requests for an evidentiary hearing were denied – it allowed the State to submit proposed findings of fact and conclusions of law *ex parte*, and adopted the State's findings *verbatim*. App. 9. Although the parties submitted conflicting expert opinions, by affidavit, regarding Mr. Miller-El's competency to stand trial, the factfindings omit any reference to Mr.

Miller-El's expert or the opinion he rendered. Instead, despite the submission of an expert opinion, and supporting documents, that Mr. Miller-El was incompetent, the findings state that Mr. Miller-El offered "nothing to show that any evidence presently exists of applicant's alleged incompetency." App. 3 at 7.

Additionally, the record reflects that the trial court doubted Mr. Miller-El's competency to stand trial. The medical records submitted to the state court contained the trial court's three separate requests for medical evaluations of Mr. Miller-El during trial. The court's third request, which was explicitly for the purpose of evaluating Mr. Miller-El's fitness to attend court, resulted in an abrupt halt of the punishment phase proceedings and Mr. Miller-El's third hospitalization during the trial.[40] Despite all of this, the state court signed the State's finding that "the record supports the fact that there was no 'bona fide doubt' as to applicant's competence to stand trial." App. 3 at 7.

The state court ceded the factfinding authority to the State in an *ex parte* proceeding, wholly ignored the evidence proffered by Mr. Miller-El, and relied on the opinion of a purported expert despite the absence of any evidence he was sufficiently qualified or informed to render an expert opinion. This constituted an objectively "unreasonable determination" of whether Mr. Miller-El was competent to stand trial and whether the trial court should have conducted a competency hearing. The Fifth Circuit, however, refused to consider the *manner* in which the state court determined the facts, and whether it was reasonable, and instead summarily deferred to the state court findings. Thus, the Fifth Circuit's analysis ignored § 2254(d)(2)'s clear mandate to examine the reasonableness of the state court's determinations of fact in light of the evidence before it.

---

[40] The State's expert, unlike Mr. Miller-El's expert, was not provided with any of the records relating to Mr. Miller-El's hospitalizations during trial.

Likewise, the Fifth Circuit refused to independently assess the "reasonableness" of the state court's factual determination that Mr. Miller-El's prosecutors did not engage in intentional racial discrimination when they exercised peremptory challenges against ten of eleven qualified black jurors. A "reasonable" determination of the genuineness of the prosecutors' motive for its peremptory challenges requires consideration of the overwhelming evidence of a pattern and practice of racial discrimination by the Dallas County District Attorney's Office, as well as evidence of contemporaneous racial discrimination by the individual prosecutors who tried Mr. Miller-El. Pursuant to § 2254(d)(2), Mr. Miller-El is entitled to relief on his *Batson* claim because the state court's factfinding that the prosecutors did not engage in racial discrimination is clearly unreasonable in light of *all* of the evidence to the contrary that was presented to the state courts during his trial and direct appeal.

This Court should grant *certiorari* to untangle the Fifth Circuit's application of § 2254(d)(2) and § 2254(e)(1), and to remedy the constitutional violations that undermine Mr. Miller-El's conviction and death sentence.

CONCLUSION

For the reasons set forth above, Petitioner THOMAS JOE MILLER-EL respectfully prays that this Court grant a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit in his case.

Respectfully Submitted,

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ORIGINAL

No. 01-7662

(3)

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
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October Term, 2001

THOMAS JOE MILLER-EL,

Petitioner,

v.

JANIE COCKRELL,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THIS IS A DEATH PENALTY CASE.
MR. MILLER-EL IS SCHEDULED TO BE EXECUTED ON FEBRUARY 21, 2002.

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APPENDICES

1. *Miller-El v. Johnson*, 261 F.3d 445 (5th Cir. 2001).
2. *Miller-El v. State*, No. 69, 677 (Tex. Crim. App. Sept. 16, 1992).
3. Findings of Fact, Conclusions of Law, and Order, *Ex parte Thomas Joe Miller-El*, No. 85-78668-L (Dist. Ct. of Dallas County, Criminal District Court Number Five, April 16, 1996).
4. Order, *Ex Parte Miller-El*, Writ No. 31,000-01 (Tex. Crim. App. Jun. 17, 1996).
5. Findings and Recommendations of the United States Magistrate Judge, *Miller-El v. Johnson*, No. 3-96-CV-1992-H (N.D. Tex. Jan. 31, 2000).
6. Memorandum Opinion and Order, *Miller-El v. Johnson*, No. 3:96-CV-1992-H (N.D. Tex. June 5, 2000).
7. *Miller-El v. Johnson*, No. 00-10784 (5th Cir. Sept. 12, 2001) (Order On Petition for Rehearing and Rehearing *En Banc*).
8. *Jury Selection in a Criminal Case*, Memorandum, Jon Sparling.
9. Affidavit of Ms. Jennifer Balido.
10. Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds*, DALLAS MORNING NEWS, Mar. 9, 1986, at A1 (photocopy).
11. Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds*, DALLAS MORNING NEWS, Mar. 9, 1986, at A1 (Westlaw reprint).
12. Ed Timms & Steve McGonigle, *A Pattern of Exclusion: Blacks Rejected from Juries in Capital Cases*, DALLAS MORNING NEWS, Dec. 21, 1986, at A1 (photocopy).
13. Ed Timms & Steve McGonigle, *A Pattern of Exclusion: Blacks Rejected from Juries in Capital Cases*, DALLAS MORNING NEWS, Dec. 21, 1986, at A1 (Westlaw reprint).
14. Juror Questionnaire of Joe Warren.

U.S. COURT OF APPEALS
FILED
AUG 07 2001
CHARLES R. FULBRUGE III
CLERK

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 00-10784

THOMAS JOE MILLER-EL,

Petitioner-Appellant,

VERSUS

GARY L. JOHNSON, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

Before JONES, DeMOSS and PARKER, Circuit Judges.

DeMOSS, Circuit Judge:

Petitioner Thomas Joe Miller-El ("Miller-El"), who was convicted of capital murder in Texas state court and who was sentenced to death therefor, and whose petition for habeas corpus relief and request for a Certificate of Appealability ("COA") therefrom were both denied by the federal district court below, now seeks from this Court a COA pursuant to 28 U.S.C. § 2253(c)(2)..

For all of the reasons set forth below, we DENY the request for a COA.

I. BACKGROUND

In 1985, Miller-El's wife, Dorothy Miller-El, was employed as a night maid for the lobby area of the Holiday Inn South. She arranged for a religious convention for the Moorish Science Temple's Feast on November 8-10, 1985. Her husband was among the attendees. After the convention, Dorothy did not return to work. Shortly before midnight on November 15, 1985, Dorothy returned to the Holiday Inn claiming that she was there to pick up her paycheck. She was given access to the office area near the vault.

During this time period, four hotel employees were working, Doug Walker, Donald Hall, Anthony Motari, and Mohamed Ali Karimijoji. Hall, the chief auditor, was training Mohamed regarding the hotel's daily closing procedures. Hall instructed Mohamed to close out the cash registers, a process which would take one-half hour. Mohamed encountered a woman who claimed that she needed accompanying while she waited for her ride. Mohamed sent her to the front desk area without leaving the locked area he was in.

At the front desk, a man later identified as Miller-El appeared and requested a room from Hall. Witnesses identified Miller-El from having seen him at the Moorish Feast convention the previous week. A younger man, later identified as Kenneth Flowers

and dressed in army fatigues and a headset, peered around the corner as Hall was giving Miller-El his room key, and once spotted by Hall, he also approached the counter. Miller-El told Hall that he would be needing two beds. Seconds later, Miller-El and Flowers pulled out weapons. Miller-El brandished a semi-automatic "tech" nine millimeter machine gun, with a flash suppressor for night use. Flowers had a .45 caliber hand gun.

Hall complied with Miller-El's instructions to empty the cash drawer and place the money on the counter. Miller-El then ordered Hall to bring any other people in the back out front. Hall instructed Walker to come out. Flowers jumped over the counter and the two men instructed Hall and Walker to lay on the floor. The two men led Hall and Walker to the bellman's closet which they ordered opened. Once the two men removed all of the valuables from the closet and took Walker's and Hall's wallets, Miller-El tied Walker's hands behind his back, tied his legs together, and gagged him with strips of fabric. Flowers did the same to Hall. Walker was laid on his face and Hall was laid on his side.

Miler-El asked Flowers if he was going to "do it" and Flowers responded that he couldn't. Flowers then left. Miller-El stood at Walker's feet, removed his glasses and then shot Walker in the back two times. Hall closed his eyes after the first shot. He heard two more shots and realized that he had also been wounded. Hall tried to talk to Walker but only heard him choking. When he heard

familiar voices outside, Hall screamed for help.

Several days after the robbery-murder, Officer Cagle was on surveillance of an apartment complex believed to be Dorothy Miller-El's. He spotted Dorothy and Flowers. With the assistance of back-up units, he stopped their vehicle and arrested them both. Search warrants were executed for the residence, and "walkie-talkie" headsets were found. When Miller-El was later arrested, found in his possession was an arsenal of weapons including the "tech" nine millimeter murder weapon.

II. PROCEDURAL HISTORY

Miller-El pleaded not guilty to and in March 1986 was tried before a jury on the charge of capital murder during the course of committing a robbery. On March 24, 1986, the jury returned with a guilty verdict and at the conclusion of the sentencing phase, the same jury answered in the affirmative to the special issues set forth in the Texas Code. Accordingly, the trial court imposed upon Miller-El the sentence of death.

Miller-El's conviction and sentence were automatically appealed to the Texas Court of Criminal Appeals. On December 14, 1992, that court affirmed Miller-El's conviction and sentence in an unpublished opinion. *See* ***Miller-El v. State***, No. 69,677 (Tex. Crim. App. 1992)(en banc)(unpublished). And on October 4, 1993, the Supreme Court denied Miller-El's petition for writ of certiorari. *See* ***Miller-El v. Texas***, 114 S. Ct. 100 (1993).

Miller-El then filed an application for state habeas relief. The state trial court judge entered findings of fact and conclusions of law recommending denial of Miller-El's state habeas petition. On June 17, 1996, the Texas Court of Criminal Appeals adopted the trial judge's findings of fact and conclusions of law and denied Miller-El's application for state habeas corpus relief. *See* ***Ex parte Miller-El***, No. 31,001-01 (Tex. Crim. App. 1996) (unpublished).

On June 17, 1997, Miller-El filed his petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 in federal district court. On August 12, 1997, Miller-El filed an amended petition for habeas corpus. Miller-El's petition was referred to a magistrate judge who, on January 31, 2000, issued findings and conclusions, recommending a denial of relief. On June 5, 2000, after receiving objections and conducting a hearing on the magistrate judge's report and recommendation, the district court adopted the magistrate's findings and conclusions and denied Miller-El's petition for a writ of habeas corpus. The district court subsequently denied Miller-El's motion to alter or amend the final judgment denying relief on June 21, 2000. Miller-El then filed a notice of appeal in this Court and a motion for a COA in the district court. On August 14, 2000, the district court denied Miller-El's request for a COA on each of the issues raised herein. It is Miller-el's renewed request for a COA that is presently

before us.

III. DISCUSSION

Miller-El seeks from this Court a COA on each of the following issues: (1) whether the district court erred in overruling his challenges of improper peremptory juror strikes; (2) whether the state court erred in failing to conduct a *sua sponte* evidentiary hearing regarding his competency to stand trial and in finding that he was competent to stand trial in 1986; (3) whether the district court likewise erred in failing to conduct a hearing regarding his competency; and (4) whether the district court erred finding that his First and Fourteenth Amendment rights were not violated by admission of evidence, during the punishment phase of his trial, relating to his affiliation with the Moorish Science Temple..

Miller-El's petition for writ of habeas corpus was filed on June 17, 1997, and is thus governed by the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See* ***Lindh v. Murphy***, 117 S. Ct. 2059, 2068 (1997); ***United States v. Carter***, 117 F.3d 262 (5th Cir. 1997). Under AEDPA, before an appeal from the dismissal or denial of a § 2254 habeas petition can proceed, the petitioner must first obtain a COA, which will issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The same standards that governed issuance of the pre-AEDPA version of the COA, the certificate of probable cause ("CPC"), apply to requests for a COA.

See ***Slack v. McDaniel***, 120 S. Ct. 1595, 1603 (2000). A petitioner makes a "substantial showing" when he demonstrates that his petition involves issues which are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are adequate to deserve encouragement to proceed further. *See* ***id.*** at 1603-04.

Additionally, pursuant to § 2254(e)(1), a state court's determination of a factual issue must be presumed correct, and the habeas petitioner bears the burden of rebutting the presumption by clear and convincing evidence. The presumption of correctness is especially strong, where, as here, the trial court and the state habeas court are one and the same. *See* ***Clark v. Johnson***, 202 F.3d 760, 764 (5th Cir.), *cert. denied*, 121 S. Ct. 84 (2000).

And while the nature of the penalty in a capital case is an appropriate consideration for determining whether to issue a COA, the severity of the penalty at issue does not, in and of itself, *require* the issuance of a COA. *See* ***Clark***, 202 F.3d at 764 (citing ***Lamb***, 179 F.3d at 356). However, in capital cases, doubts as to whether a COA should issue must be resolved in favor of the petitioner. *See* ***Lamb***, 179 F.3d at 356. Cognizant of the foregoing principles, we turn now to consider those issues raised by Miller-El in his request for a COA.

A.

Miller-El first contends that he is entitled to a COA

regarding his challenge to the prosecution's alleged improper use of peremptory strikes to exclude African-Americans from his jury. Miller-El argues that the Supreme Court's decision in ***Swain v. Alabama***, 85 S. Ct. 824 (1965), is still the applicable law regarding challenges to improper peremptory strikes when evidenced by data indicating historic, systematic discrimination against African-Americans. However, during the pendency of Miller-El's direct appeal, the Supreme Court decided ***Batson v. Kentucky***, 106 S. Ct. 1712 (1986), in which it stated that "[t]o the extent that anything in ***Swain v. Alabama*** is contrary to the principles we articulate today, that decision is overruled." ***Batson***, 106 S. Ct. at 1725. Yet Miller-El contends that ***Batson*** only overruled one part of ***Swain***. According to Miller-El, while under ***Batson***, a defendant is no longer required to establish a prima facie case of racial discrimination based upon proof of historical, consistent, and systematic exclusion of African-Americans from juries, if racial discrimination is proffered, nevertheless, under ***Swain***, then *either* the ***Swain*** or ***Batson*** evidentiary formulations apply. Miller-El argues that the evidentiary formulation of ***Swain*** is, thus, applicable to his claim of systematic exclusion. The government contends that the ***Batson*** evidentiary formulation overruled the ***Swain*** formulation on which Miller-El relies.

Under ***Swain***, a defendant was required to show the prosecutor's

"systematic use of peremptory challenges against Negroes over a period of time" as a predicate. *See* ***Swain***, 85 S. Ct. at 839. Assuming that a defendant would be able to demonstrate a historical pattern of discrimination continuing unabated to the defendant's trial, the burden would then shift to the prosecutor to rebut the defendant's allegations. *See* ***Alexander v. Louisiana***, 92 S. Ct. 1221, 1226 (1972). To satisfy his burden, the prosecutor could do one of two things. First, the prosecutor could show that the systematic disparity resulted from racially-neutral selection procedures. Second, the prosecutor could "show neutral reasons for the striking of all the blacks in petitioner's trial itself." ***Willis v. Zant***, 720 F.2d 1212, 1220-21 (11th Cir. 1983). However, in any case under ***Swain***, we have held that it is not sufficient to prove a ***Swain*** violation based solely on statistical evidence from prior trials without some concomitant showing that the intentional and systematic discrimination continued "unabated" through to the petitioner's trial. *See* ***Evans v. Cabana***, 821 F.2d 1065, 1068 (5th Cir. 1987). Additionally, the prosecutor could rebut the petitioner's showing with a showing of neutral reasons. Miller-El argues that his showing under ***Swain*** requires only a showing of historical and systematic discrimination in order to establish a prima facie case.

In ***Batson***, the Supreme Court, recognizing the "crippling burden of proof" which ***Swain*** created, replaced the ***Swain***

evidentiary formulation with the new *Batson* standard. That new standard involves the following three steps:

> First: A defendant can establish his prima facie case of purposeful discriminatory petit jury selection solely upon evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. Alternatively, the defendant can make a prima facie case by proving historic, systematic discrimination;
>
> Second: If a defendant makes a prima facie showing, the burden then shifts to the government to provide a race-neutral explanation for challenging the excluded jurors;
>
> Third: The trial court must then determine if the defendant has established purposeful discrimination, and the trial court's determination is a finding fact entitled to the applicable level of deference on appellate review.

See Batson, 106 S. Ct. at 1723-24.

Despite Miller-El's contention that the *Swain* evidentiary framework was untouched by *Batson*, the Supreme Court has itself explicitly stated "we reject [*Swain's*] evidentiary formulation as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause." *Id.* at 1721; *see also Georgia v. McCullum*, 112 S. Ct. 2348 (1992) (stating that "[i]n *Batson v. Kentucky*, [] the Court discarded *Swain's* evidentiary formulation").

With respect to the second step in the *Batson* analysis, the

Court stated specifically:

> Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's [race-neutral] explanation need not rise to the level justifying exercise of a challenge for cause.

Batson, 106 S. Ct. at 1723. Miller-El suggests that contrary to the above language in step two of the *Batson* evidentiary framework, the level of explanation required to rebut the prima facie case is governed by the rebuttal stage of the evidentiary formulation of *Swain* and is a "heavy burden." However, as we have noted, the Supreme Court has explicitly overruled the evidentiary formulation of *Swain* to the extent that it would contradict any principle, evidentiary or otherwise, announced in *Batson*. *See id.* at 1725. Thus, to the extent that the two burdens of rebuttal in *Swain* and *Batson* are inconsistent, the Supreme Court has mandated that the standard in *Batson* be applied. Here, *Batson* was decided during the pendency of Miller-El's direct appeal, and it is, thus, the applicable standard for analyzing his challenge to the use of peremptory juror strikes. *See Griffith v. Kentucky*, 107 S. Ct. 708 (1987) (holding that *Batson* governs claims by defendants whose appeals were pending and non-final at the time *Batson* was decided).

Miller-El contends that the state court's adjudication was an

unreasonable application of *Batson* and that the court's findings were also unreasonable in light of his prima facie showing. His primary challenge is to the district court's alleged failure to give proper weight and credit to the evidence which he presented regarding the historical data evidencing exclusion of African-American jurors.

The state court findings in this case on the issue of discriminatory intent, despite Miller-El's protestations to the contrary, are entitled to great deference. *See Hernandez v. New York*, 111 S. Ct. 1859, 1868 (1991). As an appellate court reviewing a federal habeas petition, we are required by § 2254(d)(2) to presume the state court findings correct unless we determine that the findings result in a decision which is unreasonable in light of the evidence presented. And the unreasonableness, if any, must be established by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

The detailed factual findings made by the state trial court establish that each of the challenged African-American jurors was stricken on race-neutral grounds. Miller-El has addressed the peremptory challenge of six of the ten *Batson* jurors in his request for a COA. We have now conducted an independent review of the findings of the state court and of the evidence presented by Miller-El in his application. Suffice it to say, and without commenting on each of the challenged jurors and the reasons

proffered for their being excluded, we find that the state court's findings are not unreasonable and that Miller-El has failed to present clear and convincing evidence to the contrary. The findings of the state court that there was no disparate questioning of the *Batson* jurors and that the prosecution's reasons for striking the jurors was due to their reluctance to assess and/or their reservations concerning the death penalty are fully supported by the record.

Having determined that the state court's adjudication neither resulted in a decision that was unreasonable in light of the evidence presented nor resulted in a decision contrary to clearly established federal law as determined by the Supreme Court, we conclude that this issue would not be debatable among jurists of reason, that courts could not resolve the issues in a different manner, and that the issue does not deserve encouragement to proceed further. Miller-El has thus failed to make a substantial showing of the denial of a constitutional right. Accordingly, we deny Miller-El's request for a COA on this issue.

B.

Miller-El's second issue consists of two parts that revolve around his claim that he was incompetent to stand trial. He first claims that the state trial court erred in failing to provide him with a *sua sponte* evidentiary hearing pursuant to *Pate v. Robinson*, 86 S. Ct. 836 (1966). Second, he challenges his conviction as

infirm under ***Dusky v. United States***, 80 S. Ct. 788 (1960), on the basis that he was incompetent, in fact, at the time of his trial. Before analyzing these claims, a brief review of some additional facts is necessary.

Miller-El was tried some eight weeks following his arrest. Incident to his arrest, Miller-El was wounded by a gunshot. During the months following his arrest, Miller-El underwent surgical treatment for his injuries, and he experienced complications such as weight loss. On three separate occasions during his trial, Miller-El was evaluated by a doctor at the direction of the trial court. First, during jury selection, he experienced chest pains, chills, and a fever. He was diagnosed with pneumonia and was treated and discharged the same day. Nine days later, still during jury selection, Miller-El complained of delays in receiving medication. The trial court ordered a second evaluation to determine if Miller-El needed more medication. The doctor determined that he did not. Two days before jury selection concluded, Miller-El was taken to the hospital for treatment of a chest abscess. During his trial, Miller-El complained of pain in his ribs and asked to see a doctor. And finally, on the evening of the day he was found guilty, the trial judge ordered a medical evaluation to determine if Miller-El would be able to sit through court after complaining of nausea and colostomy bag complications. He was kept overnight in the hospital and was released the next day

when the punishment phase of his trial began.

Miller-El complains that he was denied a competency hearing at trial and that his due process rights were denied because whenever evidence raises a sufficient doubt about the mental capacity of the accused to stand trial, a hearing is required. ***See Drope v. Missouri***, 95 S. Ct. 896, 908 (1975); ***Pate***, 86 S. Ct. 836. Miller-El contends that the evidence raised a sufficient doubt as to his competency.

In ***Carter v. Johnson***, 110 F.3d 1098 (5th Cir. 1997), we explained the procedural inquiries and burdens required for the two competency claims Miller-El asserts. Specifically, we summarized as follows:

> The issue of competency may arise in two distinct contexts. ***See United States v. Williams***, 819 F.2d 605, 607-09 (5th Cir. 1987); ***Lokos v. Capps***, 625 F.2d 1258, 1261-62 (5th Cir. 1980). We must distinguish between them for purposes of the present case.
>
> First, a habeas petitioner may allege that state procedures were inadequate to ensure that he was competent to stand trial. A trial court must conduct an inquiry into the defendant's mental capacity sua sponte if the evidence raises a bona fide doubt as to competency. ***Pate v. Robinson***, 383 U.S. 375, 86 S. Ct. 836, 15 L.Ed.2d 815 (1966). If the trial court receives evidence, viewed objectively, that should raise a reasonable doubt as to competency, yet fails to make further inquiry, this constitutes a denial of a fair trial. *See Lokos*, 625 F.2d at 1261. If a *Pate* violation is established, the federal habeas court must consider whether a meaningful hearing can be held nunc pro tunc to determine retrospectively the petitioner's competency as of the time of trial. *Id.* at 1262. If so, the petitioner bears the burden of proving his incompetence by a preponderance of the

evidence; if not, the habeas writ must issue, subject to retrial at the state's discretion. *Id.* This *Pate* procedural guarantee is not before us, having been expressly abandoned by Carter on appeal.

> Second, a habeas petitioner may collaterally attack his state conviction by directly alleging incompetence at the time of trial, thereby claiming a violation of the substantive right not to be tried and convicted while incompetent, rather than of the procedural guarantee of a competency hearing in the event that a bona fide doubt arises at trial as to competency:
>
> It is always open for the defendant to later assert his actual incompetence at trial in a subsequent collateral proceeding, but the substantive claim should not be confused with a defendant's procedural rights under Pate to a hearing whenever a bona fide doubt as to competence surfaces at trial.

Carter v. Johnson, 131 F.3d 452, 458 n.10 (5th Cir. 1997).

First, with respect to whether Miller-El was entitled to a hearing, the relevant inquiry is whether the district court received information "which, if objectively considered, should reasonably have raised a doubt about the defendant's competency and alerted [it] to the possibility that the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense." *Lokos*, 625 F.2d at 1261. In this case, the trial court specifically found that Miller-El was competent to stand trial, both at the trial and again on state habeas review. Specifically the court found:

> (1) petitioner was legally competent both on and off his pain medication; (2) he had the capacity to understand the nature and object of the proceedings against him, consult with his attorneys, and assist in the preparation of his

> defense; and (3) a competency hearing was not required because "there was no 'bona fide doubt' as to [petitioner's] competence to stand trial.

Our independent review of the record evidence convinces us that the district court's finding that Miller-El was not entitled to a hearing is not unreasonable, and Miller-El has failed to present clear and convincing evidence to the contrary.

With respect to whether Miller-El was, in fact, incompetent, we find that the district court's conclusion that he was not, is reasonable, and likewise, we find that the state court's decision does not represent an unreasonable application of federal law. Thus, we conclude that Miller-El has failed to make a substantial showing of the denial of a constitutional right, and we deny Miller-El's request for a COA on this issue.

C.

In his third issue, Miller-El claims that he is entitled to a COA because the federal district court erred in refusing to conduct an evidentiary hearing *nunc pro tunc* to determine whether he was competent to stand trial in 1986. Having concluded above that Miller-El has failed to establish a bona fide doubt as to his competency at trial under *Pate* and that the state court's determination of competence was reasonable, we need not readdress this issue.

A state court's competency determination is a finding of fact entitled to a presumption of correctness under § 2254(d)(2). And

we have stated that "[b]efore the federal district court has a duty to investigate a habeas petitioner's claim of incompetency, the petitioner must show that there are sufficient facts to 'positively, unequivocally and clearly generate a real, substantial and legitimate doubt as to the mental capacity of the petitioner to meaningfully participate and cooperate with counsel during trial.'" ***Moody v. Johnson***, 139 F.3d 477, 481 (5th Cir. 1998) (quoting *Washington v. Johnson*, 90 F.3d 945, 950 (5th Cir. 1996)). Under Section 2254(e)(1), a habeas petitioner is entitled to a *nunc pro tunc* evidentiary hearing for the purpose of proving that he was incompetent at the time he stood trial only when he "makes a showing by clear and convincing evidence to raise a threshold doubt about his competency." ***Lokos***, 625 F.2d at 1261. This threshold burden is "extremely heavy," ***Johnson v. Estelle***, 704 F.2d 232, 238 (5th Cir. 1983), and requires that a petitioner present facts sufficient to "positively, unequivocally, and clearly generate a real, substantial and legitimate doubt" concerning his mental competence, *id.* at 238. *See also* ***Jackson v. Anderson***, 112 F.3d 823 (5th Cir. 1997) (noting that § 2254(e)(1) places a heavier burden on petitioners seeking to rebut state court fact findings).

Miller-El suggests that he was entitled to an evidentiary hearing in the federal district court because he was not given a live hearing in the state court. The state habeas court instead based its decisions upon the parties' supplemental briefing and

expert affidavits, i.e, Miller-El received only a paper hearing. We find Miller-El's suggestion untenable, especially where, as here, the trial judge and the state habeas judge were the same. *See* ***Clark v. Johnson***, 202 F.3d at 766 ("we have repeatedly found that a paper hearing is sufficient to afford a petitioner a full and fair hearing on the factual issues underlying the petitioner's claims, especially where . . . the trial court and the state habeas court were one in the same.").

We conclude that Miller-El has failed to make a substantial showing of the denial of a constitutional right on this issue in that he has failed to rebut the presumptive correctness of the state habeas and district court findings that he was competent to stand trial in 1986 and that he was not entitled to a *nunc pro tunc* hearing to determine competency. Accordingly, we deny Miller-El's request for a COA on this issue.

D.

In his fourth and final issue, Miller-El argues that he is entitled to a COA on his claim that his First and Fourteenth Amendment rights were violated by the admission of evidence, during the punishment phase of his trial, relating to his affiliation with the Moorish Science Temple faith in violation of ***Dawson v. Delaware***, 112 S. Ct. 1093 (1992). In ***Dawson***, while the Supreme Court held that where religious affiliation unrelated to any issue in the case may be impermissible, there is no "per se" barrier to

the admission of evidence which concerns a defendant's beliefs and associations at sentencing. *Dawson*, 112 S. Ct. at 1097. The Court noted that "[i]n many cases . . . associational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to society." *Id.* at 166. We have, likewise, held that if the evidence regarding a defendant's affiliations or personal beliefs is sufficiently related to the issues involved, there is no constitutional violation. *See Boyle v. Johnson*, 93 F.3d 180, 183-84 (5th Cir. 1996).

Here the state habeas court concluded that Miller-El's association with the Moorish Science Temple was inextricably intertwined with his conviction and sentence. Evidence was entered in the guilt phase regarding his membership as part of testimony regarding witnesses' ability to identify him through his participation in the Moorish Temple Feast at the murder scene the week before the robbery-murder. Thus, introduction of this evidence during the guilt phase was relevant to other matters.

The additional references to his membership during the punishment phase of his trial, as the state court found, were appropriate as they related to his involvement with other group members who were heavily armed and who assisted in the commission of Miller-El's offense of conviction. The government's characterization of Miller-El as belonging to a heavily armed paramilitary group was supported by the evidence and was probative

as an indicator of future dangerousness.

Having conducted an independent review, we conclude simply that the state court's determination that Miller-El's due process rights were not violated by the prosecution's reference to his membership in the Moorish Science Temple faith were consistent with and were not contrary to the Supreme Court's applicable holding in *Dawson*. Furthermore, we conclude that the state court's adjudication of this claim was reasonable, and therefore, we deny Miller-El's request for a COA on this issue.

IV. CONCLUSION

Having carefully reviewed the record, we conclude that Miller-El has failed to make a substantial showing of the denial of a constitutional right with respect to any of the issues raised in his request for COA, and accordingly, we DENY his request for COA on all issues raised therein.

THOMAS JOE MILLER-EL, Appellant

NO. 69,677 v. - - - - Appeal from the Criminal District Court No. 5 [DALLAS County]

THE STATE OF TEXAS, Appellee

O P I N I O N

Appellant was convicted of Capital Murder for shooting to death an Irving motel clerk during the course of committing Robbery. See V.T.C.A., Penal Code, Section 19.03 (a)(2). The historical facts of this case are reported at Miller-El v. State, 782 S.W.2d 892, 893-894 (Tex.Cr.App. 1990). Punishment was assessed at death. See Art. 37.071 (b), V.A.C.C.P. Appeal to this Court is automatic. See Art. 37.071 (h), V.A.C.C.P.; Tex.R.App.Proc. 40 (b)(1).

I.

In his first seven points of error appellant makes various complaints related to the allegedly intentional exclusion of black veniremembers from jury service by the prosecuting attorneys in this case. See Swain v. Alabama, 380 U.S. 202 (1965); Strauder v. West Virginia, 100 U.S. 303 (1880). To the extent that these points implicate a claimed Sixth Amendment right to a petit jury reflecting a fair cross-section of appellant's community, we note only that such right has not been recognized by the Supreme Court, nor is its recognition by that Court anticipated by this one. Holland v. Illinois, 493 U.S. 474 (1990); Seubert v. State, 787 S.W.2d 68 (Tex.Cr.App. 1990).

Nevertheless, the original appellate record in this cause does disclose that appellant is himself an African-American and that a sufficiently disproportionate number of black veniremembers were removed by peremptory challenge of the State as to make a prima facie case of racial discrimination in the jury selection process, contrary to the Fourteenth Amendment. Because Batson v. Kentucky, 476 U.S. 79 (1986), was not decided until after trial of this cause, we abated the appeal and remanded for an evidentiary hearing in the trial court on the ultimate question of intentional discrimination. Miller-El v. State, 748 S.W.2d 459 (Tex.Cr.App.

1988). See Griffith v. Kentucky, 479 U.S. 314 (1987). We have received the supplemental transcript and statement of facts from this hearing, including the trial judge's findings of fact and conclusions of law. Based upon our independent evaluation of the supplemented record, we are of the opinion that no error is shown.

With respect to each black veniremember against whom the State exercised a peremptory challenge, a racially neutral explanation, reasonably related to the trial of this case, was offered by prosecution witnesses. See Appendix A. Thus, it became appellant's burden to prove by a preponderance of the evidence that such explanations were untrue in fact and that one or more African-American veniremembers were indeed struck by the State on account of their race. Tompkins v. State, 774 S.W.2d 195, 201-202 (Tex.Cr.App. 1987).

We have carefully reviewed the voir dire examination of these prospective jurors and find ample support there for the prosecutor's racially neutral explanations. See Young v. State, 826 S.W.2d 141 (Tex.Cr.App. 1992). Accordingly, we do not believe that such explanations are patently implausible or so contrary to the evidence as to be unworthy of belief as a matter of law. Cf. Whitsey v. State, 796 S.W.2d 707, 720 (Tex.Cr.App. 1989)(opinion on rehearing). Accordingly, we do not find the trial judge's conclusion that no black veniremembers were intentionally excluded on account of their race to be clearly erroneous.

Appellant's first seven points of error are overruled.

II.

Appellant next complains that ten prospective jurors should have been excluded for cause on his motion, mainly because their attitudes about punishment were so harsh that they could not realistically consider the minimum penalty for murder or give fair effect to the presumption of innocence. See, e.g., Faulder v. State, 745 S.W.2d 327, 339 (Tex.Cr.App. 1987), and Homan v. State, 662 S.W.2d 372 (Tex.Cr.App. 1984), respectively.

The fact that a veniremember holds strictly retributive values

or advocates severe punishment for criminal offenders does not disqualify him from jury service in this state. Just as those opposed to capital punishment or inclined to leniency in general are legally qualified jurors, so also are those holding an opposite system of values. Neither kind of person is challengeable for cause unless he harbors a bias or prejudice against the law which is likely to prevent or substantially impair performance of his duties as a juror.

One who regards with disfavor the minimum penalty for a criminal offense is not necessarily suffering an objectionable impairment. See Williams v. State, 773 S.W.2d 525, 535-537 (Tex.Cr.App. 1988). So long as he is able to give the entire legal range of punishment due consideration, he is a fully capable juror under the laws of Texas. Cordova v. State, 733 S.W.2d 175, 184-185 (Tex.Cr.App. 1987). Likewise, those who express the accurate belief that indictees are officially suspected of wrongdoing do not thereby possess a fatal bias against the presumption of innocence unless they are also unwilling to base their conclusions about culpability entirely upon the evidence actually adduced in their presence at trial. See Mays v. State, 726 S.W.2d 937, 951 (Tex.Cr.App. 1986); Bell v. State, 724 S.W.2d 780, 797 (Tex.Cr.App. 1986).

We have carefully examined the complete voir dire examination of each veniremember whom appellant claims was challengeable for cause, whether for prejudice against the full range of punishment or bias against the presumption of innocence. As to each respective claim, we find credible assertions of willingness to obey instructions of the court with respect to all matters of law affecting jury deliberations and to consider the full range of punishment applicable to every potential offense in the case. See Appendix B. Consequently, appellant has not persuaded us that the trial judge erred by rejecting his challenge to any specified veniremember.

Points of error eight through sixteen, inclusive, are overruled.

III.

In his seventeenth point of error appellant claims that the trial judge erred in refusing to allow him additional peremptory challenges during the jury selection process.

By law, each side in a capital murder prosecution wherein the death penalty is a possible punishment is allowed to decline, without specific legal cause, the service of fifteen prospective jurors. Art. 35.15 (a), V.A.C.C.P. The law does not authorize more peremptory challenges than this except for the selection of alternate jurors. Art. 35.15 (d), V.A.C.C.P. The only other instance in which an additional challenge should be dispensed by the trial judge is where he has erroneously denied an earlier challenge for cause and the aggrieved party was thereby forced to use a peremptory strike against an objectionable juror. Demouchette v. State, 731 S.W.2d 75, 83 (Tex.Cr.App. 1986); Thomas v. State, 701 S.W.2d 653, 658 (Tex.Cr.App. 1985). In such case, however, the additional challenge merely restores a full complement of strikes to the offended party.

Because appellant did not demonstrate in Part II, ante, that he was forced to expend peremptory challenges against veniremembers who should have been removed for cause at his request, failure to allow him more peremptory challenges was not improper. Barney v. State, 698 S.W.2d 114, 124 (Tex.Cr.App. 1985); Von Byrd v. State, 569 S.W.2d 883, 892-893 (Tex.Cr.App. 1978).

Appellant's seventeenth point of error is overruled.

IV.

Points of error eighteen and nineteen pertain to two witnesses called by the defense who refused to testify at trial upon the ground that their testimony might incriminate them. Appellant sought "transactional immunity" for both, and here complains that the trial judge erroneously denied it. Arguing that the State is generally entitled to such immunity for prosecution witnesses under V.T.C.A., Penal Code, Section 71.04, appellant insists that ordinary principles of fairness secure him a like consideration.

But the statute to which he refers applies by its terms only to "an offense under this chapter[,]" meaning an offense under Chapter 71 of the Penal Code. Since appellant was not charged with such an offense in the instant prosecution, it does not appear that Section 71.04 is in control of his demand for witness immunity.

In any case, neither the statute, the constitutional right of compulsory process, nor the vital decisional law of this State assures an accused equal license to compel a grant of immunity for purposes of obtaining testimony otherwise subject to the privilege against self-incrimination. Autry v. Estelle, 706 F.2d 1394, 1400-1403 (5th Cir. 1983); United States v. Chagra, 669 F.2d 241, 258-261 (5th Cir. 1982); Moorhouse v. State, 614 S.W.2d 450, 453 n. 3 (Tex.Cr.App. 1981)(Clinton, J., concurring); Ross v. State, 486 S.W.2d 327, 328-329 (Tex.Cr.App. 1972). But see Norman v. State, 588 S.W.2d 340, 343-345 (Tex.Cr.App. 1979). Witnesses who possess the privilege are themselves only entitled to testimonial or use immunity under such circumstances. Kastigar v. United States, 406 U.S. 441 (1972); Ex parte Wilkinson, 641 S.W.2d 927, 929-930 (Tex.Cr.App. 1982); Ex parte Shorthouse, 640 S.W.2d 924 (Tex.Cr.App. 1982). Accordingly, appellant's demand of transactional immunity for his witnesses need not have been granted by the trial judge.

Points of error eighteen and nineteen are overruled.

V.

Appellant's wife, a coindictee, also invoked her privilege not to testify at trial. However, appellant claims that she waived the privilege by testifying outside the jury's presence as to her name, age, marital status, and whereabouts on a date pertinent to the instant prosecution. The trial judge agreed and held her in contempt for refusing to testify before the jury, but denied appellant's request to read a transcription of her earlier testimony to the jury instead. Because this transcription would have included statements made to the trial judge tending to create an alibi for appellant, he maintains it was error to exclude the

evidence.

We need not decide whether appellant's wife indeed waived her privilege not to testify, as the transcription of her earlier statements was never actually offered in evidence by appellant. But see Grayson v. State, 684 S.W.2d 691 (Tex.Cr.App. 1984). Although the State shared appellant's view at trial that her privilege had been waived, it evidently did not agree that her remarks to the trial judge should be read to the jury, since no objection was interposed by the prosecutor when the judge denied appellant's motion to do so. It thus seems that the trial judge anticipated an objection from the State and prospectively sustained it.

Ordinarily, we would be disinclined to condone such behavior. Parties are bound to make their own objections, and trial judges are usually expected to receive evidence against which no objection has been interposed. In this instance, however, appellant didn't attempt to offer his evidence in the usual way, as by calling a witness to his wife's declarations. As a consequence, counsel for the State wasn't afforded a fair ~~opportu~~nity to register his own objections, if any. Instead, appellant solicited prospective permission of the trial judge to have his wife's statements read to the jury by the court reporter. But because this testimony was not elicited in the jury's presence to begin with, reading it back before receiving it into evidence would have been improper. In short, appellant was obliged first to offer the evidence before complaining of its exclusion. Likewise, the State was not obliged to interpose an objection to evidence not actually tendered before the trier of fact. Under the present circumstances, therefore, we think it inappropriate to find error in the court's ruling.

Appellant's twentieth point of error is overruled.

VI.

In four points of error, appellant complains of the receipt into evidence of twenty-three color photographs depicting from various angles and at various distances the murder scene and body

of the deceased. He claims that these photographs were offered "solely to inflame the minds of the jury." Martin v. State, 475 S.W.2d 265, 267 (Tex.Cr.App. 1972). We have since recognized, however, that the admissibility of photographs with inflammatory potential is controlled by Texas Rule of Criminal Evidence 403, and have declared Martin defunct to the extent of any conflict. Long v. State, 823 S.W.2d 259, 271-272 (Tex.Cr.App. 1991). Still, the result in this case would be the same under either formulation.

We have examined the exhibits in question, and they do not impress us as unusually shocking or gruesome. Because appellant doesn't dispute their relevancy, we are unconvinced that the prejudice inherent in a visual representation of this dreadful crime necessarily outweighs as a matter of law its acknowledged probative value. Tex.R.Crim.Ev. 403; Rogers v. State, 774 S.W.2d 247, 258 (Tex.Cr.App. 1989); Williams v. State, 773 S.W.2d 525, 539 (Tex.Cr.App. 1988). Accordingly, the trial judge was within the ambit of his discretion to admit the photographs.

Appellant's points of error twenty-one through twenty-four, inclusive, are overruled.

VII.

Points twenty-five through thirty-four declare that appellant's arrest and the subsequent search of his automobile were unlawful, that the ordnance seized as a result should have been suppressed, and that color photographs of the car, the weapons, and the scene were likewise inadmissible. See U.S. Const., Amend. 4; Tex.Const. Art. 1, Sec. 9.

When investigation of the murder in this case cast suspicion on appellant, a warrant was issued for his arrest and for a search of his Irving residence. It was then discovered that he had gone to Houston and was residing with an acquaintance there. Accordingly, Dallas authorities advised Harris County by teletype that appellant was wanted on a murder warrant in Irving.

Based on this information, agents of the Houston Police Department (HPD) and of the United States Bureau of Alcohol,

Tobacco, and Firearms sought a search warrant for the residence of appellant's Houston acquaintance, including another warrant for appellant's arrest. While the site was surrounded, appellant and his friend arrived in a white Cadillac Seville. After depositing his companion and the latter's young children at the house, appellant noticed approaching law enforcement officers. Evidently in an attempt to escape, he backed from the driveway and spun the car quickly around, but his egress was blocked by a police vehicle. Brandishing a pistol, he sprang from the car, was shot by an HPD marksman and then arrested.

Appellant insists that his arrest was in fact made under authority of the Harris County warrant, which was invalid because issued only after he was actually taken into custody. But we need not pass upon validity of the Harris County warrant as Houston police officers were authorized to arrest appellant pursuant to the Dallas warrant of which they had been informed. The legality of their conduct in reliance on this warrant did not depend, as appellant mistakenly contends, upon their actual possession of the document. Art. 15.26, V.A.C.C.P.; Bradley v. State, 478 S.W.2d 527, 530 (Tex.Cr.App. 1972); Cook v. State, 470 S.W.2d 898, 899 (Tex.Cr.App. 1971). Rather, they were fully empowered to arrest him on notice of the outstanding warrant received electronically from Dallas law enforcement authorities. Cf. Art. 15.08, V.A.C.C.P. Any weapons and ammunition taken at that time from his person or from places in the immediate vicinity were, of course, seized pursuant to a lawful arrest and not subject to suppression on the grounds he now urges. New York v. Belton, 453 U.S. 454 (1981).

As for items obtained from within the Cadillac, especially weapons found in the trunk, the record reflects that the car was owned by appellant's companion, who voluntarily consented to its search by law enforcement officers. See United States v. Matlock, 415 U.S. 164 (1974); Sharp v. State, 707 S.W.2d 611, 617 (Tex.Cr.App. 1986); Williams v. State, 621 S.W.2d 609, 613 (Tex.Cr.App. 1981)(panel opinion). Cf. Bumper v. North Carolina,

391 U.S. 543 (1968).

Points of error twenty-five through thirty-four, inclusive, are overruled.

VIII.

Next, appellant maintains that the court's charge to the jury erroneously failed to restrict consideration of extraneous offenses to the limited purpose for which they were proven.

When evidence is received for a limited purpose the jury should, of course, be instructed as to the limitation, at least upon timely request of an affected party. Tex.R.Crim.Ev. 105 (a). Most often such limitation is sought because the evidence is relevant, not only to the issue for which it was received, but also to some other issue upon which it was not admissible and concerning which it might therefore be unfairly prejudicial. See Tex.R.Crim.Ev. 403. Proof of an extraneous offense is almost invariably admissible at the guilt/innocence phase of trial only insofar as it illuminates a material issue in the case. E.g., Crank v. State, 761 S.W.2d 328, 340-345 (Tex.Cr.App. 1988). It is never admissible merely to encourage the inference that an accused is likely to be guilty solely because he committed other crimes in the past. Tex.R.Crim.Ev. 404 (b). E.g., Williams v. State, 662 S.W.2d 344 (Tex.Cr.App. 1983).

In the instant cause the trial judge overruled appellant's objection to the admission of extraneous offenses without requiring the State to indicate the purpose for which it offered the evidence. Whether the judge erred in this respect, either by overruling appellant's objection or by failing to specify the limited purpose for which the evidence was received, is not a question upon which appellant has sought review in this Court. Rather, he complains only that the court's charge on extraneous offenses failed to limit the jury's consideration of such evidence to the purpose for which it was received.

Since it appears from the record that such evidence was in fact received, whether rightly or wrongly, for general purposes,

the jury was thus entitled to consider it upon any issue to which it was relevant, without limitation. Tex.R.Crim.Ev. 105 (a); Richardson v. State, 786 S.W.2d 335, 337-338 (Tex.Cr.App. 1990); Cantrell v. State, 731 S.W.2d 84, 94-95 (Tex.Cr.App. 1987). Accordingly, the trial judge did not err in overruling appellant's objection.

Point of error thirty-five is overruled.

IX.

Finally, appellant asserts that four prospective jurors were excluded for cause on motion of the State because of their opposition to capital punishment, in violation of the United States Constitution. Wainwright v. Witt, 469 U.S. 412 (1985); Adams v. Texas, 448 U.S. 38 (1980); Witherspoon v. Illinois, 391 U.S. 510 (1968). An examination of the record discloses that, while not all of these veniremembers were opposed to the death penalty in principle, all were opposed for reasons of conscience or religion to serving as jurors in a case where the death penalty might be assessed.

We have held that capital veniremembers, even if willing and able honestly to answer the special punishment issues, may be challenged for cause if they would opt to refuse the oath of a juror and thereby disqualify themselves from jury service on account of personal aversion to assessing the death penalty. Goodwin v. State, 799 S.W.2d 719, 733-734 (Tex.Cr.App. 1990); Ellis v. State, 726 S.W.2d 39, 41-44 (Tex.Cr.App. 1986). Cf. Felder v. State, 758 S.W.2d 760, 765-766 (Tex.Cr.App. 1988). Contra Hernandez, 757 S.W.2d at 753. The record in this cause rather clearly reflects that each of the prospective jurors whose exclusion is at issue here chose to exercise that option.

Appellant's thirty-sixth point of error is, therefore, overruled.

Finding no reversible error in the complaints assigned for review, we affirm appellant's conviction and sentence of death.

PER CURIAM

EN BANC

DELIVERED: September 16, 1992

DO NOT PUBLISH

Overstreet, J., concurs in the result

Clinton, J., dissents

Baird and Maloney, JJ, not participating

APPENDIX A

POINTS OF ERROR ONE THROUGH SEVEN:

Boseman: Venireman #7

State's justification for peremptory strike included the venireman's testimony regarding the death penalty and his possible hesitation in giving such a sentence. Support is found in the record where Boseman testified he agreed with the death penalty but could not serve on a capital murder jury (Voir Dire Vol. I-282). Also, he testified that if he felt that the defendant should not be executed, he could not answer the three punishment issues yes even though the evidence supported affirmative answers (Voir Dire Vol. I-300 through 301).

Fields: Venireman #9

State's justification for peremptory strike included the venireman's testimony regarding rehabilitation, religious beliefs, and the fact his brother had been convicted of a felony. Support is found in the record where Fields testified that the death penalty was only appropriate when a person could not be rehabilitated and it was his belief that anyone could be rehabilitated who found God (Voir Dire Vol. I-423). Also, Fields testified his religion's doctrinal views opposed the death penalty though this was not his personal opinion (Voir Dire Vol. I-404 through 405).

Warren: Venireman #28

Justification for the peremptory strike included Warren's misgivings about the death penalty (Supp. Hearing Vol. I-29 through 31). The record indicates that Warren had mixed feelings about the death penalty serving a purpose (Voir Dire Vol. III-1532). In addition, he did not agree with the death penalty in all cases (Voir Dire Vol. III-1526). The state also noted that the strike of Mr. Warren came at a time when they had numerous peremptory strikes remaining and could utilize them with less caution.

Rand: Venireman #37

State's justification for peremptory strike included Rand's

"today I say I can, but tomorrow I might not" (Voir Dire Vol. IV-2008).

Boggess: Venireman #40

State's justification for peremptory strike includes Boggess' reluctance to sit on a capital murder jury (reflected in record at Voir Dire Vol. IV-2008) as well as the fact she had been a defense witness for her nephew at one time.

Kennedy: Venireman 43

State's justification for peremptory strike included Kennedy's belief that in a capital murder case involving a normal robbery, the death penalty was inappropriate and that it is only appropriate in mass murder situations (Voir Dire Vol. 2176 through 2178).

Baker: Venireman 71

State's justification for peremptory strike involved Baker's dislike for the death penalty and her inability to sentence another human to death (Voir Dire Vol. VIII-2990 through 2991). The State also noted that her antagonistic attitude towards the prosecuting attorney was a factor.

APPENDIX B

POINTS OF ERROR EIGHT THROUGH SIXTEEN:

Weigant: Venireman #6

Defense objected to Weigant's views regarding the death penalty. Weigant testified that his personal view was the death penalty should be used for any intentional murder. However, he specifically stated he would follow the law and would not impose his personal view upon the defendant (Voir Dire Vol. I-204 through 205). Defense also questioned whether he was capable of assessing the minimum punishment for murder. In this regard, he specifically stated he would vote for the five year minimum if the facts of the case warranted it (Voir Dire Vol. I-247 through 249).

Jenkins: Venireman #21

Defense objected to Jenkins' inability to assess the minimum penalty in a murder case. However, Jenkins specifically stated that if the evidence proved that the minimum sentence was warranted, she would give that sentence (Voir Dire Vol. III-1126).

Smale: Venireman #24

Defense objected due to Smale's inability to give the minimum sentence for murder as well as her view that she would be unable to answer any of the three punishment related questions in the negative if the defendant were found guilty of capital murder. However, during questioning by the court, she specifically stated that she would assess the minimum penalty for murder if the evidence showed that it was appropriate (Voir Dire Vol. III-1324 through 2326). She also specifically stated that she could answer one or more of the punishment questions in the negative based upon the evidence and they were not automatic "yes" votes (Voir Dire Vol. III-1336 through 1337).

Nix: Venireman #48

Defense objected due to Nix's inability to consider the minimum punishment for murder. However, she specifically stated

that she would assess punishment at five years if she thought that it was appropriate based upon the evidence presented (Voir Dire Vol. V-2396).

Walters: Venireman #79

Defense objected due to Walters' belief that she would automatically answer yes to all three punishment questions if the defendant was found guilty of capital murder. However, under questioning from the court, Walters testified that the state would have to prove that the answers to the questions were yes; if they were not proven, then she would answer in the negative (Voir Dire Vol. VIII-3393 through 3394).

Davis: Venireman #82

Defense objected to Davis' inability to assess the minimum punishment for murder. However, Davis did specifically say she could vote for the minimum penalty of five years if the evidence warranted such a sentence though she had trouble imagining such a situation (Voir Dire Vol. IX-3496 through 3497).

Spence: Venireman #85

Defense objected to Spence because he presumed the defendant had done something wrong by virtue of his being tried for capital murder. In this regard, Spence testified that an indictment did not satisfy him beyond a reasonable doubt and that he would not consider the indictment as evidence against the defendant (Voir Dire Vol. IX-3567 through 3570). Defense also questioned Spence's ability to assess the minimum penalty for murder. Spence, however, specifically stated he would keep an open mind about punishment and would assess the minimum punishment if warranted (Voir Dire Vol. IX-3534 through 3535).

Jones: Venireman #103

Defense objected to Jones' inability to consider the minimum punishment for murder. Jones did testify that he believed the punishment for any murder should be mandatory death and that this would make it easier for him to assess the maximum rather than the minimum penalty. However, he specifically stated he would put these personal views behind him and would consider the minimum penalty if the evidence supported it. (Voir Dire Vol. XI-4217 through 4220).

O'Dell: Venireman #107

Defense objected to O'Dell due to his inability to consider the minimum penalty for murder. However, he specifically stated he could consider a punishment of five years for murder in the proper case and proper circumstances (Voir Dire Vol. XI-4511 throguh 4512).

Hearne: Venireman #108

Defense objected to Hearne's bias towards police officers, her bias against psychiatrists, and her testimony that she would change her opinion of guilt or innocence if she were the only dissenting vote on the jury. However, she testified she would not give more credibility to a police officer than any other witness (Voir Dire Vol. XI-4622). She also testified her objection to psychiatrists was only in her belief that there were certain things which could not be proven. She specifically stated she would believe a psychiatrist was telling the truth to the best of his ability (Voir Dire Vol. XI-4627 through 4628). Finally, when questioned by the court, Hearne testified she would change her opinion only if convinced by the other jurors that her initial position was incorrect (Voir Dire Vol. XI-4636).

No. 69,677

THOMAS JOE MILLER-EL
Appellant,

vs.

THE STATE OF TEXAS, Appellee

APPEAL FROM

DALLAS County

AFFIRMED

OPINION BY

PER CURIAM

Judge

EN BANC

DO NOT PUBLISH

Overstreet, J., concurs in the result

Clinton, J., dissents

Baird and Maloney JJ, not participating

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EX PARTE § CRIMINAL DISTRICT COURT

§

§ NUMBER FIVE

§

MILLER-EL, THOMAS JOE, § DALLAS COUNTY, TEXAS

Applicant §

DEPUTY

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Having considered the applicant's Application for Writ of Habeas Corpus, Respondent's Original Answer, applicant's Supplemental Application for Writ of Habeas Corpus, Respondent's Answer to applicant's Supplemental Application, Petitioner's Reply to Respondent's Answer to Supplemental Application, Motion to Strike Expert Witness Affidavit, Supplemental Motion for Evidentiary Hearing and Motion for Modification of Execution Date Pending Production of Trial Counsel's Files, personal recollections, official court documents and records, and exhibits tendered by counsel, the Court makes the following Findings of Fact and Conclusions of Law:

1. Applicant is confined pursuant to the judgment and sentence of this Court in cause no. F85-78668-L in which applicant was convicted by a jury of the offense of capital murder. the jury affirmatively answered the special issues submitted, so as to support imposition of a death sentence, and the court therefore assessed punishment at death, as required by law.

2. Counsel E. Bryce Cunningham and Royce West represented the applicant at trial in cause no. F85-78668-L.

3. During applicant's trial, the undersigned, the Honorable Pat McDowell was the presiding judge.

4. Counsel E. Bryce Cunningham and Royce West represented the applicant in his motion for new trial.

5. Applicant's motion for new trial was denied on June 18, 1986.

6. Counsel E. Bryce Cunningham represented the applicant on direct appeal.

7. The Court of Criminal Appeals, sitting en banc, affirmed the death sentence on direct appeal in an unpublished opinion delivered September 16, 1992.

8. On May 16, 1995, applicant filed a application for writ of habeas corpus, cause no. W85-78668-L, in this Court.

9. Applicant's counsel on his application for writ of habeas corpus is Ruth Kollman.

10. Applicant has raised thirteen issues in this application for writ of habeas corpus:

a. whether putting applicant to trial while he was under medication and in a debilitated physical condition due to his recuperation from a gunshot wound, major surgery, pneumonia, and infections violated his due process right to a fair trial guaranteed by the Fifth and Fourteen Amendments of the United States Constitution;

b. whether putting applicant to trial while he was under medication and in a debilitated physical condition due to his recuperation from a gunshot wound, major surgery, pneumonia, and infections violated his due course of law rights to a fair trial guaranteed by article 1, § 13 and article 1, § 19 of the Texas Constitution;

c. whether putting applicant to trial while he was under medication and in a debilitated physical condition due to his recuperation from a gunshot wound, major surgery, and pneumonia violated his due process right to a fair trial because he was effectively not present during critical portions of his trial;

d. whether putting applicant to trial while he was under medication and in a debilitated physical condition due to his recuperation from a gunshot wound, major surgery, and pneumonia violated his due course of law right to a fair trial because he was effectively not present during critical portions of his trial;

e. whether the trial court violated applicant's due process rights by failing to conduct a hearing to determine the nature and extent of applicant's physical condition and to obtain expert testimony about his physical ability to withstand the rigors of trial and effectively assist in his own defense;

f. whether the trial court violated applicant's due course of law rights by failing to conduct a hearing to determine the nature and extent of applicant's physical condition and to

obtain expert testimony about his physical ability to withstand the rigors of trial and effectively assist in his own defense;

g. whether the trial court violated applicant's due process rights by failing to conduct a hearing to determine the medical necessity for either the administration or the withdrawal of applicant's medication;

h. whether the trial court violated applicant's due course of law rights by failing to conduct a hearing to determine the medical necessity for either the administration or the withdrawal of applicant's medication;

i. whether the trial court violated applicant's due process rights under the Fifth and Fourteenth Amendments and his right to compulsory process under the Sixth Amendment of the United States Constitution in preventing him from presenting his alibi defense by denying his oral motion for continuance during the course of the trial;

j. whether the trial court violated applicant's due course of law rights under article 1, §§ 13 and 19 and his right to compulsory process under article 1, § 10 of the Texas Constitution in preventing him from presenting his alibi defense by denying his oral motion for continuance during the course of the trial;

k. whether the State fundamentally violated applicant's due process rights by impermissibly and unnecessarily interjecting applicant's religious affiliation into the proceedings so as to inflame and prejudice the jury against applicant on racial and religious grounds;

l. whether the State fundamentally violated applicant's due course of law rights by impermissibly and unnecessarily interjecting applicant's religious affiliation into the

proceedings so as to inflame and prejudice the jury against applicant on racial and religious grounds; and

m. whether applicant received ineffective assistance of both trial and appellate counsel in violation of his rights under the Sixth Amendment of the United States Constitution.

11. On December 11, 1995, the State of Texas filed its Original Answer.

12. This Court finds that December 11, 1995, Barbara Stacy, Custodian of Records of the Dallas County Jail, notified Jennifer Balido, Assistant District Attorney for Dallas County, that the jail records for applicant had been located. This Court finds that the delay in the location of applicant's jail records was due to a misfiling, and therefore was not an intentional act by agents of the State to deny applicant access to these records.

13. On December 14, 1995, the Honorable Manny Alvarez, Presiding Judge of Criminal District Court Number Five, Dallas County, Texas signed an "Order Modifying Execution Date", finding that additional time was needed to review the medical records and file any additional briefs. The Court ordered that applicant's supplemental application concerning the newly discovered medical records be filed no later than the 15th day of February, 1996. The Court further ordered that the State would file its response, if any, no later than March 15, 1996. The Court further ordered that all supplemental filings concerning this matter from either party be filed no later than 30th day of March, 1996.

14. On February 15, 1996, applicant filed his "Supplemental Petition and Supporting Brief for Post-Conviction Writ of Habeas Corpus and Request for Evidentiary Hearing".

15. On March 15, 1996, Respondent filed its "Answer to Applicant's Supplemental Application for Writ of Habeas Corpus".

16. On March 29, 1996, applicant filed his "Petitioner's Reply to Respondent's Answer to Supplemental Petition, Motion to Strike Expert Witness Affidavit, Supplemental Motion for Evidentiary Hearing and Motion for Modification of Execution Date Pending Production of Trial Counsel's Files".

17. The Court finds that during all stages of his capital murder trial, applicant had the capacity to understand the nature and object of the proceedings against him, he consulted with counsel, and he assisted in preparing his defense. Drope v. Missouri, 420 U.S. 162, 172, 95 S.Ct. 896, 903, 43 L.Ed.2d 103, 113 (1975). This Court finds, based on the personal recollection of the trial court, the exhibits submitted by applicant and respondent, and the credible assertions in the affidavit of Steven Bowers, M.D., that the applicant has failed to prove by a preponderance of the evidence that he did not have the capacity to understand the nature and object of the proceedings against him, that he did not consult with his trial counsel, or that he did not assist in preparing his defense.

18. This Court finds, based on the personal recollection of the trial court and review of the trial record and the chronology prepared by respondent, that applicant had the present ability at trial to consult with his lawyer with a reasonable degree of rational understanding and that he had a rational as well as factual understanding of the proceedings against him. Dusky v. Unites States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960).

19. This Court finds, based on the personal recollection of the trial court and review of the trial record, the chronology prepared by respondent, and the credible assertions in Dr. Stephen Bowers' affidavit, that applicant was competent not only while he was on pain medication, but also when he was not on pain medication.

20. This Court finds that the trial court did not deny applicant his due process rights by ignoring evidence that indicated that applicant might not be competent. Cf. Lafferty v. Cook, 949 F.2d at 1550. This Court finds that, at the time of the trial, no evidence existed of applicant's alleged incompetency. This Court reaffirms its finding at the time of the trial that applicant was competent and had actively assisted in his defense. (R.XVII:1198). This Court further finds that applicant has presented this Court nothing to show that any evidence presently exists of applicant's alleged incompetency. This Court finds that the record supports the fact that there was no "bona fide doubt" as to applicant's competence to stand trial, and therefore the trial court was not required to conduct a separate hearing sua sponte. Ex parte Danny Dean Thomas a.k.a. Shozdijiji Shisinday, (Tex. Crim. App. no. 71929, June 7, 1995) 1995 WL 335764 at 2, citing Drope v. Missouri, 420 U.S. 162, 173, 95 S.Ct. 896, 904, 43 L.Ed.2d 103

(1975), Pate v. Robinson, 383 U.S. 375, 385, 86 S.Ct. 839, 842, 15 L.Ed.2d 815; Ex parte Johnston, 587 S.W.2d 163, 165 (Tex. Crim. App. 1979).

21. This Court finds that trial counsel for applicant assured the trial court that their client was indeed competent and aware of the facts and what was going on in the trial. (R.XVII:1198). This Court additionally finds that nothing prohibited applicant from requesting applying for a subpoena for the records of his trial counsel before the application requested on March 29, 1996. This Court, therefore, overrules as untimely applicant's motion for modification of the execution date to subpoena the files of his trial counsel.

22. This Court finds that applicant's motion for modification of the execution date to subpoena the files of his trial counsel is made not in the interest of justice, but to delay this Court's action on his pending application for habeas corpus relief.

23. This Court concludes as a matter of law that since competency is a fact question, the trial court's competency determination is presumed to be correct since applicant has failed to support his allegations of incompetence with instances in the record. Lafferty v. Cook, 949 F.2d at 1550.

24. This Court concludes as a matter of law that since the trial record, applicant's medical records, and the court's own personal recollections support that there was no bona fide doubt as to applicant's competence to stand trial, the trial court was not required to conduct a

separate hearing sua sponte. Ex parte Danny Dean Thomas a.k.a. Shozdijiji Shisinday, (Tex. Crim. App. no. 71929, June 7, 1995) 1995 WL 335764 at 2, citing Drope v. Missouri, 420 U.S. 162, 173, 95 S.Ct. 896, 904, 43 L.Ed.2d 103 (1975), Pate v. Robinson, 383 U.S. 375, 385, 86 S.Ct. 839, 842, 15 L.Ed.2d 815; Ex parte Johnston, 587 S.W.2d 163, 165 (Tex. Crim. App. 1979).

25. This Court finds that applicant cites no specific authority for his contention that the "due course of law" provisions in art. 1, §§ 13 and 19 of the Texas Constitution should be accorded a more generous interpretation of applicant's competence to stand trial under the facts of this case than their federal counterparts. This Court notes that the Court of Criminal Appeals has repeatedly said that to preserve an argument that the Texas Constitution sets a different or higher standard than the United States Constitution, the proponent must present the state constitutional point as a separate issue from the federal constitutional point and must argue the state constitutional issue separately, presenting separate argument and authority. Since applicant did not argue in the trial court or on appeal that TEX. CONST. art. 1, §§ 13 and 19 set a higher/different standard than the federal constitution, U.S. CONST. amend. XIV, and since applicant has not provided separate authority to show how or why the Texas constitutional provisions are different from the federal constitution, this Court concludes as a matter of law that **only the federal constitutional point may be reviewed in this application.** See Muniz v. State, 851 S.W.2d 238,251-252 (Tex. Crim. App. 1993) ("We will not make appellant's state constitutional claim for him"); Heitman v. State, 815 S.W.2d 681,690 n.23 (Tex. Crim. App. 1991); TEX. R. APP. P. 74. See also Morehead v. State, 807 S.W.2d 577,579 n. 1 (Tex.

Crim. App. 1991); Ex parte Keith v. State, 782 S.W.2d 861,863 n. 3 (Tex. Crim. App. 1989). This Court concludes as a matter of law that applicant has therefore waived his Texas Constitutional ground for relief.

26. This Court finds that applicant has failed to show how the **facts of this case, state precedent on this issue, and state policy considerations** compel this court to even consider his argument that the state constitution affords him greater protection regarding his competency to stand trial than the federal constitution.

27. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **structure of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and to find that, under the facts of this case, the Texas Constitution is broader in its protections regarding applicant's competence to stand trial than its federal counterpart.

28. This Court finds that applicant has failed to prove by a preponderance of the evidence that the **structural limitation of governmental power in art. 1, §§ 29 of the Texas Constitution**, however "unique", compels this Court to independently interpret the document to find, under the facts of this case, a broader protection of individual rights regarding applicant's competency to stand trial.

29. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **historical context of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and to find, under the facts of this case, broader protection regarding applicant's competency to stand trial than its federal counterpart.

30. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **language of art. 1, §§ 13 and 19 of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and to find, under the facts of this case, broader protection regarding applicant's competency to stand trial than their federal counterparts.

31. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that **art. 1, § 10 of the Texas Constitution, when combined with art. 1, §§ 13 and 19**, compels this court to independently interpret the Texas Constitution and to find, under the facts of this case, that the Texas Constitution provides, via applicant's due course of law right to a fair trial, more protection than the Fourteenth and Fifth Amendments regarding applicant's competency to stand trial.

32. This Court finds that, assuming applicant has not waived his Texas Constitutional ground for relief, and if applicant has proved that the Texas Constitution provides broader

protections than its federal counterpart, applicant has failed to prove that the trial court violated his due course of law rights under the Texas Constitution by putting him to trial without conducting a hearing to determine the nature and extent of his physical condition and its alleged affect on his ability to withstand the rigors of trial and effectively assist in his own defense. The Court concludes as a matter of law that applicant is presumed competent to stand trial and shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence. Tex. Code Crim. Proc. Ann. art. 46.02, § 1(b) (Vernon 1994). This Court concludes as a matter of law that the standard to be applied here is that a person is incompetent to stand trial if he does not have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or a rational as well as factual understanding of the proceedings against him. Tex. Code Crim. Proc. Ann. art. 46.02, § 1(a) (Vernon 1994).

33. Although if during the trial evidence of the defendant's incompetency is brought to the attention of the court from any source, the court would have been required to conduct a hearing to determine whether or not there is evidence to support a finding of incompetency to stand trial, Tex. Code Crim. Proc. Ann. art. 46.02, § 2(b) (Vernon 1994), this Court finds that applicant has failed to prove by a preponderance of the evidence that the trial court received evidence from any source such that a "bona fide doubt" as to applicant's competency was raised under Tex. Code Crim. Proc. Ann. art. 46.02, § 2(b) (Vernon 1994). This Court therefore finds that applicant has failed to prove by a preponderance of the evidence that the trial court erred in not conducting a hearing to determine the competency of applicant.

34. This Court finds that applicant has failed to prove by a preponderance of the evidence that his physical condition denied him a fair trial under the United States Constitution by rendering him not "effectively present" during critical portions of his trial. Applicant cites two cases in support of his contention: Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934) and Adanandus v. State, 866 S.W.2d 210 (Tex. Crim. App. 1993). This Court concludes as a matter of law that both Snyder and Adanandus address issues surrounding the **physical absence** of an accused during critical portions of his trial, and applicant has failed to show this Court how these cases address mental or physical incapacity as a basis for a claim of not being effectively "present" during trial. Applicant fails to cite any additional authority to support his contention that putting him to trial while he was under medication and in a debilitated physical condition due to his recuperation from a gunshot wound rendered him "not effectively present" during his trial.

35. This Court finds that even if applicant had cited applicable case law, applicant has failed to prove by a preponderance of the evidence that his physical condition rendered him not "effectively present" during his trial. This Court finds, based on personal recollections of the trial court and review of the trial record, that applicant had an understanding of the trial process and what was going on in the courtroom.

36. This Court finds that applicant cites no specific authority for his contention that the "due course of law" provisions in art. 1, §§ 13 and 19 of the Texas Constitution should be accorded a more generous interpretation of applicant's "effective presence" during his trial under

the facts of this case than their federal counterparts. This Court notes that the Court of Criminal Appeals has repeatedly said that to preserve an argument that the Texas Constitution sets a different or higher standard than the United States Constitution the proponent must present the state constitutional point as a separate issue from the federal constitutional point and must argue the state constitutional issue separately, presenting separate argument and authority. Since applicant did not argue in the trial court or on appeal that TEX. CONST. art. 1, §§ 13 and 19 set a higher/different standard than the federal constitution, U.S. CONST. amend. XIV, and since applicant has not provided separate authority to show how or why the Texas constitutional provisions are different from the federal constitution, this Court concludes as a matter of law that **only the federal constitutional point may be reviewed in this application.** See Muniz v. State, 851 S.W.2d 238,251-252 (Tex. Crim. App. 1993) ("We will not make appellant's state constitutional claim for him"); Heitman v. State, 815 S.W.2d 681,690 n.23 (Tex. Crim. App. 1991); TEX. R. APP. P. 74. See also Morehead v. State, 807 S.W.2d 577,579 n. 1 (Tex. Crim. App. 1991); Ex parte Keith v. State, 782 S.W.2d 861,863 n. 3 (Tex. Crim. App. 1989). This Court concludes as a matter of law that applicant has therefore waived his Texas Constitutional ground for relief.

37. This Court finds that applicant has failed to show how the **facts of this case, state precedent on this issue, and state policy considerations** compel this Court to even consider his argument that the state constitution affords him greater protection than the federal constitution regarding his "effective presence" during his trial. This Court concludes as a matter

of law that applicant's reliance on Ex parte Johnson, 587 S.W.2d 163, 166 (Tex. Crim. App. 1979) in support of his contention is misplaced.

38. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **structure of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and to find that, under the facts of this case, the Texas Constitution is broader in its protections regarding applicant's "effective presence" during his trial than its federal counterpart.

39. This Court finds that applicant has failed to prove by a preponderance of the evidence that the **structural limitation of governmental power in art. 1, §§ 29 of the Texas Constitution**, however "unique", compels this Court to independently interpret the document to find, under the facts of this case, a broader protection of individual rights regarding applicant's "effective presence" during his trial.

40. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **historical context of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and to find, under the facts of this case, that the Texas Constitution provides broader protection than its federal counterpart regarding applicant's "effective presence" during his trial.

41. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **language of art. 1, §§ 13 and 19 of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and find, under the facts of this case, that the Texas Constitution provides broader protection than its federal counterparts regarding applicant's "effective presence" during his trial.

42. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that **art. 1, § 10 of the Texas Constitution, when combined with art. 1, §§ 13 and 19**, compels this Court to independently interpret the Texas Constitution to find, under the facts of this case, that the Texas Constitution provides, via applicant's due course of law right to a fair trial, more protection than the Fourteenth and Fifth Amendments regarding applicant's "effective presence" during his trial.

43. In his fifth ground for relief, applicant contends that he was denied due process of law in that the trial court did not conduct a hearing to determine the nature and extent of applicant's physical condition and to obtain expert testimony about applicant's physical ability to withstand the rigors of trial and to effectively assist in his own defense, but he relies upon authority regarding the **competency** of the accused and the trial court's duty to investigate that competency. The Court therefore concludes as a matter of law that the ground is inadequately briefed and will not consider it.

44. This Court finds that, if applicant had adequately briefed the issue regarding the trial court's failure to conduct a hearing to determine the nature and extent of applicant's physical condition and to obtain expert testimony about applicant's physical ability to withstand the rigors of trial and assist in his own defense, applicant has failed to prove by a preponderance of the evidence that his physical condition warranted a hearing by the trial court.

45. This Court finds, based on the recollection of the trial court and supported by the trial record, that whenever applicant communicated to the trial court, through his trial counsel, that he was unable to physically continue, the trial court would stop the trial until applicant was able to continue. (See, e.g., R.XVII:1294-1296 and 1434, where the trial court informs the jury that the attorneys are prepared to work into the late evening to finish their presentation of evidence in the punishment phase of the trial, but the trial court recesses the jury early after applicant's trial counsel states, "Mr. Miller-El has indicated---off the record.").

46. In his sixth ground for relief, applicant cites authority that contends that he was denied his due course of law rights under the Texas Constitution in that the trial court did not conduct a hearing to determine the nature and extent of applicant's physical condition and to obtain expert testimony about applicant's ability to withstand the rigors of trial and effectively assist in his own defense, but he does not offer any additional argument or authority to support his contention. This Court notes that the Court of Criminal Appeals has repeatedly said that to preserve an argument that the Texas Constitution sets a different or higher standard than the United States Constitution, the proponent must present the state constitutional point as a separate

issue from the federal constitutional point and must argue the state constitutional issue separately, presenting separate argument and authority. Since applicant did not argue in the trial court or on appeal that TEX. CONST. art. 1, §§ 13 and 19 set a higher/different standard than the federal constitution, U.S. CONST. amend. XIV, and since applicant has not provided separate authority to show how or why the Texas constitutional provisions are different from the federal constitution, this Court concludes as a matter of law that **only the federal constitutional point may be reviewed in this application.** See Muniz v. State, 851 S.W.2d 238,251-252 (Tex. Crim. App. 1993) ("We will not make appellant's state constitutional claim for him"); Heitman v. State, 815 S.W.2d 681,690 n.23 (Tex. Crim. App. 1991); TEX. R. APP. P. 74. See also Morehead v. State, 807 S.W.2d 577,579 n. 1 (Tex. Crim. App. 1991); Ex parte Keith v. State, 782 S.W.2d 861,863 n. 3 (Tex. Crim. App. 1989). This Court concludes as a matter of law that applicant has therefore waived his Texas Constitutional ground for relief.

47. This Court finds that applicant has failed to show how the facts of this case, state precedent on this issue, and state policy considerations compel this court to even consider his argument that the state constitution affords him greater protection than the federal constitution regarding the trial court's duty to conduct a hearing to determine the nature and extent of applicant's physical condition and the trial court's duty to obtain expert testimony about his physical ability withstand the rigors of trial and effectively assist in his own defense.

48. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **structure**

of the Texas Constitution compels this Court to independently interpret the Texas Constitution and to find that, under the facts of this case, the Texas Constitution is broader in its protections than its federal counterpart regarding the trial court's duty to conduct a hearing to determine the nature and extent of applicant's physical condition and the trial court's duty to obtain expert testimony about his physical ability to withstand the rigors of trial and effectively assist in his own defense.

49. This Court finds that applicant has failed to prove by a preponderance of the evidence that the **structural limitation of governmental power in art. 1, §§ 29 of the Texas Constitution**, however "unique", compels this Court to independently interpret the document to find, under the facts of this case, a broader protection of individual rights regarding the trial court's duty to conduct a hearing to determine the nature and extent of applicant's physical condition and the trial court's duty to obtain expert testimony about his physical ability to withstand the rigors of trial and effectively assist in his own defense.

50. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **historical context of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and to find, under the facts of this case, the Texas Constitution provides broader protection than its federal counterpart regarding the trial court's duty to conduct a hearing to determine the nature and extent of applicant's physical condition and the trial court's duty to

obtain expert testimony about his physical ability to withstand the rigors of trial and effectively assist in his own defense.

51. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **language of art. 1, §§ 13 and 19 of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and to find, under the facts of this case, the Texas Constitution provides broader protection than its federal counterpart regarding the trial court's duty to conduct a hearing to determine the nature and extent of applicant's physical condition and the trial court's duty to obtain expert testimony about his physical ability to withstand the rigors of trial and effectively assist in his own defense.

52. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that **art. 1, § 10 of the Texas Constitution, when combined with art. 1, §§ 13 and 19**, compels this court to independently interpret the Texas Constitution to find, under the facts of this case, that the Texas Constitution provides, via applicant's due course of law right to a fair trial, additional protection than the Fourteenth and Fifth Amendments regarding the trial court's duty to conduct a hearing to determine the nature and extent of applicant's physical condition and the trial court's duty to obtain expert testimony about his physical condition withstand the rigors of trial and effectively assist in his own defense.

53. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, and if applicant has proved that the Texas Constitution provides broader protections than its federal counterpart, applicant has still failed to prove by a preponderance of the evidence that the trial court violated his due course of law rights under the Texas Constitution by putting him to trial without conducting a hearing to determine the nature and extent of his physical condition and its alleged affect on his ability to withstand the rigors of trial and effectively assist in his own defense.

54. This Court finds that applicant has failed to prove by a preponderance of the evidence that he was denied to his right to due process when the trial court did not conduct a hearing to determine the medical necessity for either the administration or the withdrawal of applicant's medication. This Court finds that applicant has failed to prove by a preponderance of the evidence that he was **forcibly** medicated, and absent such a showing, this Court concludes as a matter of law that applicant's reliance on Riggins v. Nevada, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992) is misplaced. Ex parte Danny Dean Thomas a.k.a. Shozdijiji Shisinday, 1995 WL 335764 at 2.

55. This Court finds that applicant has failed to prove by a preponderance of the evidence that he was under the influence of an anti-psychotic medication during his trial. Applicant has failed to argue any authority to compel this Court to extend the holding of the United States Supreme Court in Riggins v. Nevada, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992), to include types of medication other than antipsychotic medication. Absent such a

showing, this Court concludes as a matter of law that applicant's reliance on Riggins v. Nevada is misplaced. See Riggins v. Nevada, 504 U.S. at ___, 112 S.Ct. at 1816, 118 L.Ed.2d at ___.

56. This Court finds that, even if Riggins v. Nevada would apply, applicant has failed to prove by a preponderance of the evidence that the trial court erred in not conducting a hearing to determine the medical necessity for either the administration or the withdrawal of applicant's medication. The Court further finds that based on the credible assertions of Dr. Adrian Collyns in his letter to the trial court dated February 24, 1986 and in his affidavit, that applicant did not require any pain medication to attend court after his prescription for pain medication ran out.

57. Applicant cites no specific authority for his contention that the "due course of law" provisions in art. 1, §§ 13 and 19 of the Texas Constitution should be accorded a more generous interpretation than their federal counterparts regarding the duty of the trial court, if any, to conduct a hearing to determine the medical necessity for either the administration or the withdrawal of applicant's medication under the facts of this case than their federal counterparts. This Court notes that the Court of Criminal Appeals has repeatedly said that to preserve an argument that the Texas Constitution sets a different or higher standard than the United States Constitution, the proponent must present the state constitutional point as a separate issue from the federal constitutional point and must argue the state constitutional issue separately, presenting separate argument and authority. Since applicant did not argue in the trial court or on appeal that TEX. CONST. art. 1, §§ 13 and 19 set a higher/different standard than the federal constitution, U.S. CONST. amend. XIV, and since applicant has not provided separate authority

to show how or why the Texas constitutional provisions are different from the federal constitution, this Court concludes as a matter of law that **only the federal constitutional point may be reviewed in this application.** See Muniz v. State, 851 S.W.2d 238,251-252 (Tex. Crim. App. 1993) ("We will not make appellant's state constitutional claim for him"); Heitman v. State, 815 S.W.2d 681,690 n.23 (Tex. Crim. App. 1991); TEX. R. APP. P. 74. See also Morehead v. State, 807 S.W.2d 577,579 n. 1 (Tex. Crim. App. 1991); Ex parte Keith v. State, 782 S.W.2d 861,863 n. 3 (Tex. Crim. App. 1989). This Court concludes as a matter of law that applicant has therefore waived his Texas Constitutional ground for relief.

58. This Court finds that applicant has failed to show how **the facts of this case, state precedent on this issue, and state policy considerations** compel this court to even consider his argument that the state constitution affords him greater protection than the federal constitution regarding the duty of the trial court, if any, to conduct a hearing to determine the medical necessity for either the administration or the withdrawal of applicant's medication.

59. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **structure of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and to find that, under the facts of this case, the Texas Constitution is broader in its protections than the federal constitution regarding the duty of the trial court, if any, to conduct a hearing to determine the medical necessity for either the administration or the withdrawal of applicant's medication.

60. This Court finds that applicant has failed to prove by a preponderance of the evidence that the **structural limitation of governmental power in art. 1, §§ 29 of the Texas Constitution**, however "unique", compels this Court to independently interpret the document to find, under the facts of this case, a broader protection of individual rights regarding the duty of the trial court, if any, to conduct a hearing to determine the medical necessity for either the administration or the withdrawal of applicant's medication.

61. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **historical context of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and to find in it, under the facts of this case, broader protection than in its federal counterpart regarding the duty of the trial court, if any, to conduct a hearing to determine the medical necessity for either the administration or the withdrawal of applicant's medication.

62. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **language of art. 1, §§ 13 and 19 of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and find in them, under the facts of this case, broader protection than in their federal counterparts regarding the duty of the trial court, if any, to conduct a hearing to determine the medical necessity for either the administration or the withdrawal of applicant's medication.

63. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that **art. 1, § 10 of the Texas Constitution, when combined with art. 1, §§ 13 and 19**, compels this court to independently interpret the Texas Constitution to find, under the facts of this case, that the Texas Constitution provides, via applicant's due course of law right to a fair trial, additional protection than the Fourteenth and Fifth Amendments regarding the duty of the trial court, if any, to conduct a hearing to determine the medical necessity for either the administration or the withdrawal of applicant's medication.

64. This Court finds that applicant has failed to prove by a preponderance of the evidence that he was denied due process of law when the trial court prevented him from presenting his alibi defense by denying his oral motion for continuance during trial. This Court finds that applicant failed to comply with the Texas Code of Criminal Procedure, which provides that a criminal action may be continued on the written motion of the State or of the defendant, upon sufficient cause shown, Tex. Code Crim. Proc. Ann. art. 29.03 (1994), and which requires that the motion must be sworn to by a person having personal knowledge of the facts relied on for the continuance. Tex. Code Crim. Proc. Ann. art. 29.08 (1994). This Court also finds that applicant has failed show this Court any reason why his failure to comply with the statutory requirements for a continuance should be overlooked by this Court.

65. This Court finds that even though applicant failed to comply with the statutory requirements for a continuance after the trial had begun, the trial court considered applicant's

motion for continuance on its merits, and denied the motion. (R.XVII:1121, 1166). This Court finds that applicant has failed to prove by a preponderance of the evidence that his right to due process of law was violated by the trial court's consideration and denial of his motion for continuance.

66. This Court finds that applicant has failed prove by a preponderance of the evidence that the trial court abused its discretion in overruling applicant's oral motion for continuance during the trial.

67. This Court finds that applicant has failed to prove by a preponderance of the evidence not only that the denial of the continuance was an abuse of discretion of the trial court but also "so arbitrary and fundamentally unfair" that it denied him due process and rendered his trial fundamentally unfair. McFadden v. Cabana, 851 F.2d 784 (5th Cir. 1988), citing Hicks V. Wainright, 633 F.2d 1146, 1148 (5th Cir. 1981); Kirkpatrick v. Blackburn, 777 F.2d 272, 279 (5th Cir. 1985), cert. denied, 476 U.S. 1178, 106 S.Ct. 2907, 90 L.Ed.2d (1986)(citing United States v. Bagley, 473 U.S. 667, 678, 105 S.Ct. 3375, 3381, 87 L.Ed.2d 481 (1985)).

68. This Court finds that applicant has failed to prove by a preponderance of the evidence the probability of procuring the testimony of his co-defendant wife within a reasonable time in his attempt to establish that the trial court abused its discretion in denying applicant's motion for continuance. This Court finds that Dorothy Miller-El pled "nolo contendere" to the charges of Murder and Attempted Capital Murder on August 27, 1992, almost six years after

her husband's motion for continuance. The Court concludes as a matter of law that this delay is not a "reasonable time" for procurement of testimony as a basis for applicant's motion for continuance under Hicks v. Wainright, 633 F.2d at 1149.

69. This Court finds that applicant has failed to prove by a preponderance of the evidence that the testimony of his co-defendant wife would have been of such weight and believability so as to influence the decision of the jury. See Byrd v. Wainwright, 428 F.2d 1017 (5th Cir. 1970). This Court finds that, based on the overwhelming weight of the evidence against applicant, including the credible assertions of the eye-witness to the robbery-murder and considering the affidavit of applicant's wife, Dorothy Miller-El, it would be mere speculation to conclude that the proposed testimony by applicant's co-defendant wife would have been of such weight and believability as to influence the decision of a jury. See Byrd v. Wainwright, 428 F.2d 1017 (5th Cir. 1970).

70. Applicant cites no specific authority for his contention that the "due course of law" provisions in art. 1, §§ 13 and 19 and the right to compulsory process in art. 1, § 10 of the Texas Constitution should be accorded a more generous interpretation than their federal counterparts under the facts of this case regarding the trial court's denial of applicant's motion for continuance. This Court notes that the Court of Criminal Appeals has repeatedly said that to preserve an argument that the Texas Constitution sets a different or higher standard than the United States Constitution, the proponent must present the state constitutional point as a separate issue from the federal constitutional point and must argue the state constitutional issue

separately, presenting separate argument and authority. Since applicant did not argue in the trial court or on appeal that TEX. CONST. art. 1, §§ 13 and 19 set a higher/different standard than the federal constitution, U.S. CONST. amend. XIV, and since applicant has not provided separate authority to show how or why the Texas constitutional provisions are different from the federal constitution, this Court concludes as a matter of law that **only the federal constitutional point may be reviewed in this application.** See Muniz v. State, 851 S.W.2d 238,251-252 (Tex. Crim. App. 1993) ("We will not make appellant's state constitutional claim for him"); Heitman v. State, 815 S.W.2d 681,690 n.23 (Tex. Crim. App. 1991); TEX. R. APP. P. 74. See also Morehead v. State, 807 S.W.2d 577,579 n. 1 (Tex. Crim. App. 1991); Ex parte Keith v. State, 782 S.W.2d 861,863 n. 3 (Tex. Crim. App. 1989). This Court concludes as a matter of law that applicant has therefore waived his Texas Constitutional ground for relief.

71. This Court finds that applicant has failed to show how **the facts of this case, state precedent on this issue, and state policy considerations** compel this court to even consider his argument that the state constitution affords him greater protection than the federal constitution regarding the trial court's denial of his motion for continuance.

72. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **structure of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and to find that, under the facts of this case, the Texas Constitution is broader in its protections than its federal counterpart regarding the trial court's denial of his motion for continuance.

73. This Court finds that applicant has failed to prove by a preponderance of the evidence that the **structural limitation of governmental power in art. 1, §§ 29 of the Texas Constitution**, however "unique", compels this Court to independently interpret the document to find, under the facts of this case, a broader protection of individual rights regarding the trial court's denial of his motion for continuance.

74. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **historical context of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and to find, under the facts of this case, that the Texas Constitution provides broader protection than its federal counterpart regarding the trial court's denial of his motion for continuance.

75. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **language of art. 1, §§ 13 and 19 of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and to find, under the facts of this case, that the Texas Constitution provides broader protection than its federal counterpart regarding the trial court's denial of his motion for continuance.

76. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that **art. 1, § 10 of**

the Texas Constitution, when combined with art. 1, §§ 13 and 19, compels this court to independently interpret the Texas Constitution to find, under the facts of this case, that the Texas Constitution provides, via applicant's due course of law right to a fair trial, additional protection than the Fourteenth and Fifth Amendments regarding the trial court's denial of his motion for continuance.

77. This Court finds that applicant has failed to prove by a preponderance of the evidence why the procedural requirements for a motion for continuance under Tex. Code Crim. Proc. Ann., Chapter 29, should not apply to his oral motion for continuance in this case. The Court also finds that applicant has failed to prove by a preponderance of the evidence that he was surprised when his co-defendant wife invoked her fifth amendment privilege not to testify.

78. This Court finds that based on the statement of applicant's trial counsel during trial a week before actually calling defendant's wife to the stand that it was his understanding that applicant's wife would invoke her fifth amendment privilege not to testify, that applicant was not surprised by his wife's actions. This Court further finds that applicant has failed to prove by a preponderance of the evidence that his wife's invocation of her fifth amendment right not to testify was such an unexpected occurrence since the trial began, which no reasonable diligence could have anticipated, the applicant was so taken by surprise that a fair trial could not be had. Tex. Code Crim. Proc. Ann. art. 29.13 (Vernon 1994).

79. This Court concludes as a matter of law that motions for continuance are addressed to the court's discretion. Tex. Code Crim. Proc. Ann. art. 29.06 (Vernon 1994). This Court further concludes as a matter of law that equitable motions for continuance made during trial are reviewable as well under an abuse of discretion standard. Vega v. State, 898 S.W.2d 359, 361 (Tex. App. -- San Antonio 1995, no pet.); Darty v. State, 149 Tex. Crim 256, 193 S.W.2d 195 (1946); Daigle v. State, 658 S.W.2d 774 (Tex. App. -- Beaumont 1983, no pet.). This Court finds that applicant has failed to prove by a preponderance of the evidence that the trial court abused its discretion in denying applicant's oral motion for continuance, whether the motion is considered statutory or equitable.

80. This Court concludes as a matter of law that O'Rarden v. State, 777 S.W.2d 455 (Tex. App.--Dallas, 1989, pet. ref'd) is distinguishable from the instant case. This Court finds that applicant's argument that a "surprise" motion for continuance during trial need not comply with the procedural requirements because the testimony from the witness stand or representations of counsel provide the basis of the motion belies the factual situation in the instant case. This Court finds, based on personal recollection of the trial court and a review of the trial record, at **no time** did applicant's trial counsel contend that anyone on the defense team was surprised when applicant's wife invoked her fifth amendment privilege. The Court additionally finds that applicant's trial counsel simply asked for a continuance until the wife's related cases were complete and she no longer needed the protection of the Fifth Amendment. The Court further finds applicant's trial counsel had acknowledged more than a week earlier that applicant's wife

would indeed invoke her right not to testify. The Court finds that applicant has failed to prove by a preponderance of the evidence that any exigency or "surprise" existed.

81. . This Court finds that, while in his instant application for habeas corpus relief applicant tries to circumvent the requirements of chapter 29 of the Code of Criminal Procedure in this application by claiming he was surprised by his wife's actions at the time of his trial, the motion for continuance was based on his wife being unavailable to testify. This Court finds (and applicant concedes in his application) that an "absent witness" motion for continuance must satisfy the requirements of the Code of Criminal Procedure. Lewis v. State, 664 S.W.2d 345. 349 (Tex. Crim. App. 1984); Ramirez v. State, 842 S.W.2d 796, 800 (Tex. App.--El Paso 1992, no pet.); Coons v. State, 758 S.W.2d 330, 335 (Tex. App.--Houston [14th Dist.] 1988, pet. ref'd).

82. The Court finds that applicant has failed to prove by a preponderance of the evidence that justice would have been better served by the trial court continuing applicant's trial for six years so that his wife could dispose of her own related criminal charges and testify in his behalf. The Court further finds that no justice would have been served in delaying applicant's trial until some unforeseeable date in the future. Williams v. State, 625 S.W.2d 769 (Houston [14th Dist.] 1981, no pet.). The Court finds that only after August 27, 1992, when applicant's wife pled "nolo contendere" to the charges of Murder and Attempted Capital murder, would Dorothy Miller-El have been available to testify.

83. This Court finds that even if applicant had proved that the trial court abused its discretion in denying his motion for continuance, applicant has failed to prove by a preponderance of the evidence that a reasonable probability exists that the verdict might have been different had the trial been properly conducted. Schrader v. Whitley, 904 F.2d 282, 288 (5th Cir. 1990).

84. This Court finds that applicant has failed to prove by a preponderance of the evidence how the potential prejudice, if any, of evidence of the group affiliation of applicant outweighed its probative value in proving the identity of applicant as the person who committed this capital murder. This Court finds that the jury was entitled to know about applicant's prior visit to the scene of the murder and the circumstances surrounding it. See Beasley v. State, 902 S.W.2d 452 (Tex. Crim. App. 1995). This Court finds that eyewitness Donald Hall's identification of applicant and other members of the religious organization as the group that robbed the hotel and killed Douglas Walker was based on his seeing them at the Holiday Inn two weeks prior when the group celebrated the Moorish Temple Feast, and thus applicant's affiliation with this religious group was relevant.

85. This Court finds that applicant has failed to prove how his due process rights were violated by the trial court admitting evidence of his group affiliation. This Court finds that applicant has failed to prove how the admission of this evidence inflamed or prejudiced the jury against applicant on racial or religious grounds. This Court finds that the applicant has failed to point to any instance in the record where the State put on any evidence regarding the

philosophy, religious beliefs, or practices of the group. This Court further finds that applicant has failed to cite to any instance in the record where the State's attorneys or witnesses criticized or degraded the organization or implied to the jury that the defendant was more or less guilty because of his affiliation with the group.

86. Applicant cites no specific authority for his contention that the "due course of law" provisions in art. 1, §§ 13 and 19 of the Texas Constitution should be accorded a more generous interpretation of applicant's group affiliation under the facts of this case than their federal counterparts. This Court notes that the Court of Criminal Appeals has repeatedly said that to preserve an argument that the Texas Constitution sets a different or higher standard than the United States Constitution, the proponent must present the state constitutional point as a separate issue from the federal constitutional point and must argue the state constitutional issue separately, presenting separate argument and authority. Since applicant did not argue in the trial court or on appeal that TEX. CONST. art. 1, §§ 13 and 19 set a higher/different standard than the federal constitution, U.S. CONST. amend. XIV, and since applicant has not provided separate authority to show how or why the Texas constitutional provisions are different from the federal constitution, this Court concludes as a matter of law that **only the federal constitutional point may be reviewed in this application.** See Muniz v. State, 851 S.W.2d 238,251-252 (Tex. Crim. App. 1993) ("We will not make appellant's state constitutional claim for him"); Heitman v. State, 815 S.W.2d 681,690 n.23 (Tex. Crim. App. 1991); TEX. R. APP. P. 74. See also Morehead v. State, 807 S.W.2d 577,579 n. 1 (Tex. Crim. App. 1991); Ex parte Keith v. State,

782 S.W.2d 861,863 n. 3 (Tex. Crim. App. 1989). This Court concludes as a matter of law that applicant has therefore waived his Texas Constitutional ground for relief.

87. This Court finds that applicant has failed to show how **the facts of this case, state precedent on this issue, and state policy considerations** compel this court to even consider his argument that the state constitution affords him greater protection than the federal constitution regarding his group affiliation.

88. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **structure of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and to find that, under the facts of this case, the Texas Constitution is broader in its protections than its federal counterpart regarding applicant's group affiliation.

89. This Court finds that applicant has failed to prove by a preponderance of the evidence that the **structural limitation of governmental power in art. 1, §§ 29 of the Texas Constitution**, however "unique", compels this Court to independently interpret the document to find, under the facts of this case, broader protection of individual rights regarding applicant's group affiliation.

90. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **historical**

context of the Texas Constitution compels this Court to independently interpret the Texas Constitution and to find, under the facts of this case, the Texas Constitution provides broader protection than its federal counterpart regarding applicant's group affiliation.

91. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that the **language of art. 1, §§ 13 and 19 of the Texas Constitution** compels this Court to independently interpret the Texas Constitution and find, under the facts of this case, the Texas Constitution provides broader protection than its federal counterpart regarding applicant's group affiliation.

92. This Court finds that, if applicant has not waived his Texas Constitutional ground for relief, applicant has failed to prove by a preponderance of the evidence that **art. 1, § 10 of the Texas Constitution, when combined with art. 1, §§ 13 and 19**, compels this court to independently interpret the Texas Constitution to find, under the facts of this case, that the Texas Constitution provides, via applicant's due course of law right to a fair trial, more protection than the Fourteenth and Fifth Amendments regarding applicant's group affiliation.

93. This Court finds that applicant has failed to prove by a preponderance of the evidence that he received ineffective assistance when his trial counsel did not raise the issue of his competency at trial or seek a continuance until his physical condition improved to a point he

would be competent. This Court finds that applicant has failed to prove that he received ineffective assistance when his trial counsel did not request a competency hearing. This Court finds that the record does not reveal any evidence that would raise a "bona fide doubt" as to the competency of applicant during his trial. Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); Tex. Code Crim. Proc. Ann. art. 46.02 §2(b) (Vernon 1979).

94. This Court finds that nothing in the trial record, the trial court's file, the medical records from the two hospitals that treated applicant, or applicant's records from the Dallas County Jail proves by a preponderance of the evidence that applicant received ineffective assistance when his trial counsel did not raise the issue of his competency at trial, did not request a competency hearing, and did not seek a continuance until his physical condition improved.

95. This Court finds that applicant has failed to prove by a preponderance of the evidence that applicant received ineffective assistance when his trial counsel did not request a hearing to determine the necessity of continuing or discontinuing applicant's medication. This Court also finds that applicant has failed to cite any relevant authority that the actions of his trial counsel in not requesting a hearing to determine the necessity of continuing or discontinuing applicant's medication should be considered such a serious error that his trial counsel were not functioning effectively as counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds that applicant has failed to prove by a preponderance of the evidence that any deficient performance of his trial counsel prejudiced the

defense to such a degree that the defendant was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds that applicant has failed to prove how this alleged "omission or mistake" of his trial counsel amounted to professional errors such as to raise a reasonable possibility that the outcome of the trial would be different but for the errors. Strickland v. Washington, 466 U.S. at 694.

96. This Court finds that applicant has failed to prove by a preponderance of the evidence that applicant received ineffective assistance when his trial counsel did not adhere to the statutory requirements of Tex. Code Crim. Proc. Ann., Chapter 29, in making applicant's motion for continuance. This Court finds that applicant has failed to prove how he was prejudiced by the actions of his trial counsel when the trial court considered the merits of the motion even though the oral motion for continuance did not adhere to the statutory requirements of Tex. Code Crim. Proc. Ann., Chapter 29.

97. This Court also finds that applicant has failed to prove by a preponderance of the evidence that when his trial counsel did not adhere to the statutory requirements of Tex. Code Crim. Proc. Ann., Chapter 29, his trial counsel committed such a serious error that they were not functioning effectively as counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds that applicant has failed to prove by a preponderance of the evidence that any deficient performance of his trial counsel prejudiced the defense to such a degree that the defendant was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds that

applicant has failed to prove how this alleged "omission or mistake" of his trial counsel amounted to professional errors such as to raise a reasonable possibility that the outcome of the trial would be different but for the errors. Strickland v. Washington, 466 U.S. at 694.

98. This Court finds that applicant's inclusion of his contention that he received ineffective assistance from his trial counsel when they failed to introduce into evidence the testimony of his applicant's co-defendant wife as a statement of an unavailable witness in the same ground for relief as his ineffective assistance claim regarding his counsel not making a motion for continuance renders this ground as multifarious and presents nothing for this Court for review. Tex. R. App. P. 74(d); County v. State, 821 S.W.2d 303, 308 (Tex. Crim. App. 1989).

99. This Court finds that, if applicant has properly preserved his contention that his trial counsel were ineffective when they did not offer the testimony of applicant's co-defendant wife as a statement of an unavailable witness, applicant has failed to prove by a preponderance of the evidence that their inaction constituted such a serious error that they were not functioning effectively as counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds that applicant has failed to prove by a preponderance of the evidence that any deficient performance of his trial counsel prejudiced the defense to such a degree that the defendant was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court also finds that applicant has failed to prove how this alleged "omission or mistake" of his trial counsel amounted to professional

errors such as to raise a reasonable possibility that the outcome of the trial would be different but for the error, Strickland v. Washington, 466 U.S. at 694, especially in light of the fact that applicant's wife was, at the time of trial, under criminal indictment for her role in this same robbery-murder.

100. This Court finds that the applicant has failed to prove by a preponderance of the evidence that the testimony of the applicant's co-defendant wife was admissible as a statement of an unavailable witness. This Court concludes as a matter of law that under Tex. R. Crim. Evid. 804(b)(1), testimony given by an unavailable declarant as a witness at another hearing of the same or a different proceeding will not be excluded under the hearsay rule **if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination**. This Court finds that in this situation, the State did not have an opportunity to examine applicant's wife during the hearing where she attempted to invoke her Fifth Amendment not to testify and thus did not have the opportunity to develop the testimony by cross examination. This Court therefore concludes as a matter of law that the statement of applicant's codefendant wife would be excluded under the hearsay rule.

101. This Court finds that applicant has failed to prove by a preponderance of the evidence that the hearing testimony of the applicant's co-defendant wife was admissible at all. This Court finds that the testimony of applicant's wife as to the location of her husband during

the robbery/murder was not responsive to the question asked by the trial court. (R.XVII:1078). This Court finds that applicant's wife's non-responsive answer was not admissible as evidence.

102. This Court finds that applicant has failed to prove by a preponderance of the evidence that he was not afforded effective assistance when his trial counsel did not object to the admission of, or alternatively seek a limiting instruction for, evidence of extraneous offenses. This Court finds that applicant has failed to prove by a preponderance of the evidence that his trial counsel's inaction constituted such a serious error that they were not functioning effectively as counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds that applicant has failed to prove by a preponderance of the evidence that any deficient performance of his trial counsel prejudiced the defense to such a degree that the defendant was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court also finds that applicant has failed to prove how this alleged "omission or mistake" of his trial counsel amounted to professional errors such as to raise a reasonable possibility that the outcome of the trial would be different but for the error, Strickland v. Washington, 466 U.S. at 694.

103. This Court finds that applicant, in support of his contention that he did not receive effective assistance when his trial counsel did not object to the admission of, or alternatively seek a limiting instruction for, evidence of extraneous offenses, has only cited to one portion of the trial record which contains testimony that was heard outside the presence of the jury. (See R.XV:310). This Court finds that, without other specific citations to the record demonstrating

where extraneous acts were heard by the jury, applicant has failed to adequately brief this issue for this Court's review. This Court further finds that, without other citations to the record that demonstrate where extraneous acts were considered by the jury, applicant has failed to prove by a preponderance of the evidence that he was harmed by the admission of extraneous offenses.

104. This Court finds that, even if the issue is adequately briefed for consideration by this Court, applicant has failed to prove by a preponderance of the evidence that the extraneous offenses he complains of in his application were not "circumstances of the offense" and thus relevant to proving applicant's identity as the person who committed the capital murder. This Court finds that the complained-of testimony concerned the facts surrounding the arrest of applicant in Houston, including charges against applicant for evading arrest and the unlawful carrying of a weapon. The Court finds that a Houston police officer testified that applicant, in an attempt to escape the approaching law enforcement officers, quickly spun around the car that he was driving but was stopped by a police vehicle blocking his way. Miller-El v. State, no. 69,677 at 8. This Court finds that the Houston police officer testified that applicant, sprang from the car, brandishing a pistol, and was shot by an Houston Police Department marksman and then arrested. Miller-El v. State, no. 69,677 at 8; (R.XV:316). This Court also finds that the evidence in the trial established that one of the two guns applicant carried at the time of his arrest was the murder weapon. (R.XV:933).

105. This Court finds that applicant has failed to rebut the presumption that his trial counsel, in not objecting to the admission of, or alternatively seeking a limiting instruction for,

evidence of extraneous offenses, were exercising sound trial strategy. Jackson v. State, 877 S.W.2d at 771. This Court also finds that applicant has failed to overcome the presumption that trial counsel made all significant decisions in the exercise of reasonable professional judgment. Delrio v. State, 840 S.W.2d 724 (Tex. Crim. App. 1992). This Court finds that applicant's trial counsel, while cross-examining the Houston police officer in a hearing outside the presence of the jury regarding the arrest and search, elicited testimony that the actual owner of the vehicle applicant was driving, John Hicks, had been in the vehicle moments before applicant's arrest. (R.XV:331). The Court finds that the Houston police officer also testified, under cross-examination by applicant's trial counsel, that Hicks was also the owner of the house that was searched pursuant to a search warrant, where other evidence linked to the robbery/murder was found. (R.XV:333). The Court further finds that applicant's trial counsel, in cross-examining the Houston police officer, succeeded in having the officer admit that applicant had no connection with the house searched (R.XV:335) and, other than being in the car at the time it was stopped, no connection with the car (R.XV:337). The Court finds that applicant's trial counsel later argued in closing argument that the items found in the car and the house, attributed to applicant, did not in fact belong to applicant, but to John Hicks, the owner of the car and the Houston residence. (R.XVII:1240-1242). This Court therefore finds that applicant's trial counsel exercised sound trial strategy in arguing that the evidence could not be linked to applicant.

106. This Court finds that applicant has failed to prove by a preponderance of the evidence that he did not receive effective assistance when his trial counsel did not request a limiting jury instruction in substantially correct form regarding evidence of extraneous offenses.

The Court finds that applicant has failed to prove that his trial counsel's actions constituted such a serious error that they were not functioning effectively as counsel, in light of the trial court's instruction to applicant's trial counsel to make their objections orally as if they were in writing. (R.XVII:1201). Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds that applicant has failed to prove by a preponderance of the evidence that any deficient performance of his trial counsel prejudiced the defense to such a degree that the defendant was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court also finds that applicant has failed to prove how this alleged "omission or mistake" of his trial counsel amounted to professional errors such as to raise a reasonable possibility that the outcome of the trial would be different but for the error, Strickland v. Washington, 466 U.S. at 694.

107. The Court finds that applicant has failed to prove by a preponderance of the evidence why the jury was not entitled to consider the evidence of extraneous offenses upon any issue to which it was relevant, without limitation, when the evidence was admitted into evidence for general purposes (explained by the trial court as "circumstances of the offense"). Miller-El v. State (Tex. Crim. App. no. 69,677, September 16, 1992) at 10, citing Richardson v. State, 786 S.W.2d 335, 337-338 (Tex. Crim. App. 1990); Cantrell v. State, 731 S.W.2d 84, 94-95 (Tex. Crim. App. 1987).

108. This Court concludes as a matter of law that, because the Court of Criminal Appeals has previously held that the extraneous offenses admitted in this case were admitted for

the jury's unlimited consideration and that a limiting instruction was therefore not required, applicant's trial counsel could not be ineffective for failing to request such an instruction. See Camacho v. State, 864 S.W.2d 524, 534-35 (Tex. Crim. App. 1993).

109. This Court finds that applicant has failed to prove by a preponderance of the evidence that he received ineffective assistance because his trial counsel did not investigate confirmation of applicant's alleged alibi through the narcotic surveillance of the Irving Police Department. This Court finds that applicant has failed to prove such evidence existed and this Court further finds that applicant fails to show how his unsubstantiated accusation proves that there was a reasonable probability that, but for his trial counsel's inaction, the result of the trial would have been different. See Guidry v. State, 896 S.W.2d 381, 385 (Tex. App.--Texarkana, 1995, no pet.); Strickland v. Washington, 466 U.S. at 694.

110. This Court finds, based on the credible assertions in the affidavit of Irving Police Department Detective Randall Johnson, that the Irving Police Department did not have any surveillance records in its possession that would tend to prove that applicant was anywhere other than at the Holiday Inn in Irving, Texas, during the time of the robbery/murder. Without such a showing, applicant has failed to prove by a preponderance of the evidence that his trial counsel's inaction constituted such a serious error that they were not functioning effectively as counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds that applicant has failed to prove by a preponderance of the evidence that any deficient performance of his trial counsel prejudiced the defense to such a degree that the

defendant was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court also finds that applicant has failed to prove how this alleged "omission or mistake" of his trial counsel amounted to professional errors such as to raise a reasonable possibility that the outcome of the trial would be different but for the error, Strickland v. Washington, 466 U.S. at 694.

111. This Court finds that applicant has failed to prove by a preponderance of the evidence that he received ineffective assistance when his trial counsel permitted information concerning applicant's affiliation with the "Moorish Science Temple" to come before the jury. This Court finds that applicant has failed to prove that evidence of his affiliation with this group was not relevant to proving applicant's identity as the person who committed the robbery/murder and to demonstrate the reliability of eyewitness Donald Hall's identification of applicant. Without such a showing of harm, applicant has failed to prove by a preponderance of the evidence that his trial counsel's allowing this evidence to come before the jury constituted such a serious error that they were not functioning effectively as counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds that applicant has failed to prove by a preponderance of the evidence that any deficient performance of his trial counsel prejudiced the defense to such a degree that the defendant was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court also finds that applicant has failed to prove how this alleged "omission or mistake" of his trial counsel amounted to professional errors such as to raise a reasonable possibility that the

outcome of the trial would be different but for the error, Strickland v. Washington, 466 U.S. at 694.

112. This Court finds that applicant has failed to prove by a preponderance of the evidence that his trial counsel were not exercising sound trial strategy when they allowed the admission of evidence of applicant's group affiliation before the jury. Jackson v. State, 877 S.W.2d at 771. This Court finds that applicant, in fact, attempted to use his religious affiliation to his advantage in his punishment case-in-chief. (R.XIX:115). This Court finds that applicant has failed to overcome the presumption that trial counsel made all significant decisions in the exercise of reasonable professional judgment. Delrio v. State, 840 S.W.2d 724 (Tex. Crim. App. 1992).

113. This Court finds that applicant has failed to prove by a preponderance of the evidence that he received ineffective assistance because his trial counsel should have known that applicant's wife would be brought into the courtroom to be identified by a witness while dressed in her jail uniform, and therefore his trial counsel should have made a motion to have her dressed more appropriately before she entered the courtroom. This Court finds that applicant has failed to prove that his trial counsel made such a serious error in not making a motion before his wife entered the courtroom that they were not functioning effectively as counsel and that their actions amounted to professional errors that denied him a fair trial. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052, 80 L. Ed. at 674.

114. This Court finds that applicant's trial counsel asked the jury to be excused before applicant's wife was brought into the courtroom and finds that if applicant's trial counsel had known that she would be brought into the courtroom in her jail garb, they would have made the objection at that time. This Court finds that, as soon as it became known to applicant's trial counsel that she was in her jail uniform, they did everything in their power to cure the prejudice, if any, by objecting and moving for a mistrial.

115. This Court finds applicant has failed to prove by a preponderance of the evidence that whatever harm applicant suffered by the appearance of applicant's wife before the jury in her jail uniform was not cured by the trial court's instruction to the jury to disregard her clothing. This Court finds that applicant has failed to prove by a preponderance of the evidence that any deficient performance of his trial counsel prejudiced the defense to such a degree that the defendant was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

116. This Court concludes as a matter of law that applicant's reliance on Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed. 126 (1976) is misplaced. This Court finds that the United States Supreme Court in Estelle was not faced with a similar fact situation as the instant case as applicant contends since Estelle himself was put to trial in identifiable prison clothing, whereas applicant was dressed in a suit during his jury trial.

117. This Court finds that even if Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed. 126 (1976) applies under the facts of this case, and even if the actions of applicant's trial counsel constituted error, applicant has failed to show a reasonable probability that the outcome of the trial would be different but for his wife appearing before the jury in her jail uniform. Strickland v. Washington, 466 U.S. at 694.

118. This Court finds that in analyzing a claim under Estelle, the Court of Criminal Appeals has held that where there is no showing of harm or prejudice to applicant and when the evidence prevails overwhelmingly against him, error, if any, is harmless beyond a reasonable doubt. Kimbel v. State, 537 S.W.2d 254 (Tex. Crim. App. 1976). This Court finds that applicant has not brought forth any evidence that he was harmed or prejudiced by his wife's appearance in her jail uniform. This Court finds that applicant himself was clothed in civilian clothing, as required in Estelle. Additionally, this Court finds that the evidence against applicant, from the eyewitness testimony to applicant's possession of the murder weapon when he was arrested, was overwhelming, and thus error, if any, is harmless beyond a reasonable doubt.

119. This Court finds that applicant has failed to prove by a preponderance of the evidence that he was denied effective assistance of counsel and that his right to a fair trial suffered due to the fact that one of his trial counsel, Royce West, was running for the office of District Attorney of Dallas County, Texas, during his trial. This Court finds that applicant has failed to prove by a preponderance of the evidence that Mr. West's representation was deficient

because of his candidacy for the office of District Attorney of Dallas County. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052, 80 L. Ed. at 674. Applicant has also failed to prove that any deficient performance prejudiced the defense to such a degree that applicant was deprived of a fair trial. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052, 80 L. Ed. at 674. This Court finds that applicant has failed to allege or prove by a preponderance of the evidence that any action by Royce West constituted such serious errors that he was not functioning effectively as counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court also finds that applicant has failed to prove how this alleged "omission or mistake" amounted to professional errors such as to raise a reasonable possibility that the outcome of the trial would be different but for the error, Strickland v. Washington, 466 U.S. at 694.

120. This Court finds that the trial court was aware of the fact that Royce West, at the time of applicant's trial, was a candidate in the Democratic Primary for the office of District Attorney of Dallas County, Texas, and found no conflict existed between Mr. West's representation of applicant and his candidacy. (R.XIV:47-48).

121. This Court finds that applicant has failed to prove that the pre-trial hearing on applicant's "Motion to Quash the Jury Selected and/or Select a Separate Jury" was not a justified inquiry into potential systematic prejudice against blacks serving on juries in Dallas County. This Court finds that, although Mr. West's political opponent was one of the nine witnesses called to testify in the hearing, Mr. Cunningham, not Mr. West, questioned him.

122. This Court finds that applicant has failed to rebut the presumption that his trial counsel performed competently. Jackson v. State, 877 S.W.2d 768,771 (Tex. Crim. App. 1994).

123. This Court finds that applicant has failed to rebut the presumption that his trial counsel made all significant decisions in the exercise of reasonable professional judgment. Delrio v. State, 840 S.W.2d 724 (Tex. Crim. App. 1992).

124. This Court finds that applicant has failed to prove by a preponderance of the evidence that his trial counsel's performance, viewed as a whole, was deficient, in that he made such serious errors they were not functioning effectively as counsel and that his trial counsel's deficient performance prejudiced the defense to such a degree that the defendant was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds that applicant has failed to prove by a preponderance of the evidence that any deficient performance of his trial counsel prejudiced the defense to such a degree that the defendant was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds that applicant has failed to prove by a preponderance of the evidence that his trial counsel committed omissions or other mistakes which, viewed as a whole, amounted to professional errors such as to raise a reasonable possibility that the outcome of the trial would be different but for the errors. Strickland v. Washington, 466 U.S. at 694.

125. This Court has previously found that applicant failed to prove that a bona fide doubt existed as to his competency to stand trial, and this Court finds that without such a showing, applicant cannot prove that his appellate counsel was ineffective in not arguing on appeal that his trial counsel should have requested a hearing to determine his competency or a continuance until he regained his competency.

126. This Court has previously found that applicant failed to prove that the trial court erred in its finding that applicant was competent to stand trial, and this Court has previously found that applicant has failed to prove by a preponderance of the evidence that, without a bona fide doubt of the competency of applicant, the trial court had no cause to hold a competency hearing sua sponte; therefore, this Court finds that applicant has failed to prove that applicant's appellate counsel was ineffective in not arguing on appeal that the trial court erred in not conducting a competency hearing.

127. This Court has previously held that applicant failed to prove that his medication status affected his competency and that applicant failed to prove the trial court erred in failing to hold a hearing to determine the need for applicant's medication; therefore, this Court finds that applicant has failed to prove by a preponderance of the evidence that he was denied effective assistance when his appellate counsel did not argue on appeal that the trial court erred in not conducting a hearing to determine the necessity of continuing or ending applicant's medication.

128. This Court has previously held that applicant failed to prove that the trial court erred in denying applicant's motion for continuance, which was based on "surprise" created by his co-defendant wife's invocation of her right to remain silent; therefore, this Court finds that applicant has failed to prove by a preponderance of the evidence that he was denied effective assistance when his appellate counsel failed to argue on appeal that the trial court erred in its denial of the motion for continuance.

129. This Court has previously found that applicant failed to prove that the trial court erred in allowing evidence of applicant's affiliation with the Moorish Science Temple; therefore this Court finds that applicant has failed to prove by a preponderance of the evidence that applicant was denied effective assistance when his appellate counsel failed to argue on appeal that the trial court erred in allowing this evidence before the jury.

130. This Court has previously found that applicant failed to prove that he was denied effective assistance of counsel at trial; therefore, this court finds that applicant has failed to prove by a preponderance of the evidence that he was denied effective assistance on appeal when his appellate counsel did not allege any ineffective assistance claims regarding the representation by his trial counsel.

131. This Court finds that applicant has failed to prove by a preponderance of the evidence that his appellate counsel's performance, viewed as a whole, was deficient, in that he made such serious errors he was not functioning effectively as counsel and that his appellate

counsel's deficient performance prejudiced the defense to such a degree that the defendant was deprived of a full and fair appeal. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds that applicant has failed to prove by a preponderance of the evidence that any deficient performance of his appellate counsel prejudiced the defense to such a degree that the defendant was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds that applicant has failed to prove by a preponderance of the evidence that his appellate counsel committed omissions or other mistakes which, viewed as a whole, amounted to professional errors such as to raise a reasonable possibility that the outcome of the appeal would be different but for the errors. Strickland v. Washington, 466 U.S. at 694.

132. This Court finds that applicant has failed to rebut the presumption that his appellate counsel performed competently. Jackson v. State, 877 S.W.2d 768,771 (Tex. Crim. App. 1994).

133. This Court finds that applicant has failed to rebut the presumption that his appellate counsel made all significant decisions in the exercise of reasonable professional judgment. Delrio v. State, 840 S.W.2d 724 (Tex. Crim. App. 1992).

134. Applicant's claims are without merit; thus, applicant fails to show that he was denied due process and fundamental fairness. Applicant has failed to demonstrate that his conviction was improperly obtained. Accordingly, it is recommended to the Texas Court of

Criminal Appeals that relief be denied. The Court admits as evidence the exhibits of applicant and of the State attached to, or accompanying, their pleading in this case, and the Court has examined and considered those exhibits as well as the entire record in this case in reaching these findings of facts and conclusions of law. The Court finds that there are no controverted, previously unresolved facts material to the legality of applicant's confinement which require a further evidentiary hearing.

ORDER

THE CLERK IS HEREBY ORDERED to prepare a transcript of all papers in cause number W85-78668-L(A) and transmit same to the Court of Criminal Appeals as provided by Article 11.07 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

all of the applicant's pleadings filed in cause number W85-78668-L(A) including his Application for Writ of Habeas Corpus and exhibits contained therewith and any subsequent filings;

the Respondent's Original Answer in cause number W85-78668-L(A) and exhibits contained therewith and any subsequent filings;

this Court's findings of fact, conclusions of law, and order;

the indictment, judgment, sentence, docket sheet, and appellate record in cause number F85-78668-L, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER **ORDERED** to send a copy of this Court's findings of fact and conclusions of law, including its order, to applicant's counsel, Ruth Kollman, 6517 Hillcrest, Suite 310, Dallas, Texas, 75205, and to counsel for the State.

SIGNED this 16 th day of April, 1996

PAT MCDOWELL, SITTING FOR
JUDGE MANNY ALVAREZ
CRIMINAL DISTRICT COURT FIVE
DALLAS COUNTY, TEXAS

EX PARTE THOMAS JOE MILLER-EL

WRIT NO. 31,001-01

Habeas Corpus Application

from DALLAS County

ORDER

This is an application for a writ of habeas corpus transmitted to this Court pursuant to the provisions of Article 11.07, V.A.C.C.P. Applicant was convicted of capital murder in the Criminal District Court Number Five of Dallas County and sentence was assessed at death following affirmative replies to the special issues submitted to the jury pursuant to Article 37.071, V.A.C.C.P.

In the present application Applicant raises thirteen allegations, some with subparts, challenging the conviction or the penalty assessed. The trial court judge entered findings of fact and conclusions of law and a recommendation that all relief requested be denied. We have reviewed the record along with the application itself and its supporting documentation. We find that the findings of fact and conclusions of law are fully supported by the record and that the recommendation should be followed.

Accordingly, all relief requested is denied.

IT IS SO ORDERED THIS THE 17TH DAY OF JUNE, 1996.

PER CURIAM

DO NOT PUBLISH

pltys. CMRR 1-3.

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JAN 3 1 2000
NANCY DOHERTY, CLERK
By _____ Deputy

THOMAS JOE MILLER-EL	§	
	§	
Petitioner,	§	
	§	
VS.	§	
	§	NO. 3-96-CV-1992-H
GARY JOHNSON, Director	§	
Texas Department of Criminal	§	
Justice, Institutional Division	§	
	§	
Respondent.	§	

ENTERED ON DOCKET
JAN 3 1 2000
U.S. DISTRICT CLERK'S OFFICE

FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

This case has been referred to the United States magistrate judge pursuant to 28 U.S.C. § 636(b) and an order of reference from the district court. The findings and recommendation of the magistrate judge are as follow:

I.

PROCEDURAL BACKGROUND

Petitioner Thomas Joe Miller-El was convicted of capital murder and sentenced to death. His conviction and sentence were affirmed on direct appeal. *Miller-El v. State*, No. 69,677 (Tex. Crim. App. September 16, 1992), *cert. denied*, 114 S.Ct. 100 (1993). Petitioner also filed an application for writ of habeas corpus in state court. The trial judge made written findings and recommended that the application be denied. The Texas Court of Criminal Appeals denied habeas relief in an unpublished opinion. *Ex parte Miller-El*, No. 31,001 (Tex. Crim. App. June 17, 1996). Petitioner then filed this action in federal court.

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II.

ISSUES PRESENTED

Petitioner raises four issues in six grounds for relief. He contends that: (1) the prosecution exercised its peremptory challenges in a racially discriminatory manner; (2) a prospective juror was improperly struck for cause; (3) the trial court failed to conduct a competency hearing and allowed the trial to proceed despite the fact that he was incompetent; and (4) the prosecutor improperly referred to his religious affiliation during sentencing.

III.

STANDARD OF REVIEW

The standard of review in federal habeas proceedings is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT, Pub.L. No. 104-132, 110 Stat. 1214 (1996). The AEDPA establishes specific standards and procedures for reviewing death penalty habeas cases. *See* 28 U.S.C. §§ 2661-2266. These rules apply to all capital cases pending on or after the effective date of the AEDPA, provided the state has established a mechanism for the "appointment, compensation, and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings." *Id.* § 2261(a), (b) & (c). Texas does not yet meet these "opt-in" requirements. *Carter v. Johnson*, 110 F.3d 1098, 1104 (5th Cir.), *vacated on other grounds*, 118 S.Ct. 409 (1997). Therefore, the Court must look to the general standards of review under the AEDPA.

A federal court may not grant habeas relief with respect to any claim that was adjudicated on the merits in a state court proceeding unless petitioner shows that the prior adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law; or (2) resulted in a decision that was based on an unreasonable

determination of the facts in light of the evidence presented in the state court. 28 U.S.C. § 2254(d). A state court decision is not "contrary to clearly established federal law" unless a different result was dictated by existing Supreme Court precedent. *Drinkard v. Johnson*, 97 F.3d 751, 768 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 1114 (1997). A state fact finding is not "unreasonable" unless the petitioner can rebut the finding by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). An application of law to facts is not "unreasonable" unless "[the] state court decision is so clearly incorrect that it would not be debatable among reasonable jurists." *Drinkard*, 97 F.3d at 769.[1]

IV.

PEREMPTORY CHALLENGES
(Grounds 1 & 2)

In two related grounds for relief, petitioner argues that the prosecution used 10 of its 14 peremptory challenges to exclude African-Americans from jury service in violation of the equal protection clause of the Fourteenth Amendment.

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[1] Petitioner argues that *Drinkard* misinterpreted the standard of review for federal habeas cases under 28 U.S.C. § 2254(d)(1). The *Drinkard* court held that the first clause of the statute--prohibiting habeas relief unless the state court adjudication resulted in a decision that was "contrary to" clearly established federal law--applies only to questions of pure law. Under this interpretation, a federal court cannot grant habeas relief unless the state court failed to identify the correct rule of law when it adjudicated the claim. *Drinkard*, 97 F.3d at 767-68. Petitioner advocates a different interpretation of the "contrary to" clause. He suggests that the proper inquiry should be whether the Supreme Court had announced a controlling rule of law prior to the time the claim was adjudicated in state court. If so, a federal habeas court must decide whether the state court decision is "contrary to" that established law. Otherwise, the "unreasonable application" clause of the statute comes into play and the federal court must determine whether the state court adjudication was untenable under existing Supreme Court authority. (Pet. Reply at 13-17).

In sum, petitioner maintains that there is no basis for the distinction in the standard of review for "pure legal questions" and "mixed questions of law and fact" under the AEDPA. Both should be subject to review under the "unreasonable application" clause of section 2254(d)(1) where there is no Supreme Court authority directly on point. (*Id.*). *See Drinkard*, 97 F.3d at 778-79 (E. Garza, J., dissenting). Moreover, petitioner contends that the court's interpretation of the "unreasonable application" clause--making habeas relief available "only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists"--raises serious problems under Article III and the Suspension Clause of the U.S. Constitution. (Pet. Reply at 20). These are thoughtful and provocative arguments. Nevertheless, this Court is bound by the *Drinkard* majority and must follow its holding. *See Cedillo v. Valcar Enterprises & Darling Delaware Co.*, 773 F.Supp. 932, 936 (N.D. Tex. 1991) (district court is bound by Fifth Circuit precedent).

A. Applicable Law

The Fourteenth Amendment guarantees every defendant in a criminal case equal protection under the law. *Hernandez v. State*, 347 U.S. 475, 477, 74 S.Ct. 667, 670, 98 L.Ed. 866 (1954). This right extends to the jury selection process. *Swain v. Alabama*, 380 U.S. 202, 204, 85 S.Ct. 824, 826, 13 L.Ed.2d 759 (1965); *Strauder v. West Virginia*, 10 Otto 303, 100 U.S. 303, 305-08, 25 L.Ed. 664 (1879). Thus, a prosecutor may not use his allotted peremptory challenges to exclude potential jurors solely on the basis of their race. *Swain*, 85 S.Ct. at 837-38. Prior to the *Batson* decision in 1986, the use of peremptory strikes against minorities in any single case was not unconstitutional. *Id.* at 836-37. Rather, a defendant was required to demonstrate a historical pattern of racial bias in the selection of juries. *Id.* at 837-38. The Fifth Circuit explained this burden as follows:

> In order to prevail [on a *Swain* claim], [petitioner] must prove that his prosecutor "had a systematic *and intentional* practice of excluding blacks from traverse juries in criminal trials through the exercise of peremptory challenges, and that this practice continued unabated through petitioner's trial."

Evans v. Cabana, 821 F.2d 1065, 1068 (5th Cir.), *cert. denied*, 108 S.Ct. 5 (1987), *quoting Willis v. Zant*, 720 F.2d 1212, 1220 (11th Cir. 1983), *cert. denied*, 104 S.Ct. 3548 (1984) (emphasis in original). Absent evidence of purposeful and systematic discrimination, the prosecutor was entitled to a presumption that he used his peremptory strikes in a proper manner. *Swain*, 85 S.Ct. at 837.

The Supreme Court revisited this issue twenty years later in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Recognizing that it was often impossible for a defendant to prove the systematic exclusion of minorities from jury service over an extended period of time, the Court rejected this evidentiary formulation "as inconsistent with standards that

have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause." *Id.*, 106 S.Ct. at 1721.[2] No longer were defendants required to establish a historical pattern of discrimination in the use of peremptory strikes. *Batson* held that "a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in *his case*." *Id.* at 1722 (emphasis in original).

A proper *Batson* challenge has three elements. First, the defendant must raise an inference that the prosecutor excluded potential jurors solely on the basis of race. *Id.* at 1723; *United States v. Wallace*, 32 F.3d 921, 925 (5th Cir. 1994). A defendant may satisfy this burden in a variety of ways, such as showing a pattern of strikes against minority jurors on the venire panel or statements made by the prosecutor during the voir dire examination. *Batson*, 106 S.Ct. at 1723. Once the defendant makes a *prima facie* case, the burden shifts to the prosecution to articulate a race-neutral explanation for each of the challenged strikes. *Id.* at 1723-24; *Wallace*, 32 F.3d at 925. This inquiry focuses on the facial validity of the proffered explanation. "Unless discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral." *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995) (citations omitted); *see also United States v. Perkins*, 105 F.3d 976, 978 (5th Cir. 1997). The trial court then determines whether the defendant has proven purposeful discrimination. *Batson*, 106 S.Ct. at 1724; *Wallace*, 32 F.3d at 925.

When the record contains an explanation for the prosecutor's use of peremptory challenges, the reviewing court need only decide the propriety of the ultimate finding of discrimination.

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[2] The Supreme Court observed that the "crippling burden" imposed by *Swain* rendered the prosecution's use of peremptory challenges "largely immune from constitutional scrutiny." *Batson*, 106 S.Ct. at 1721. Indeed, this Court has found only two reported cases in which *Swain* relief was granted. *See State v. Washington*, 375 So.2d 1162 (La. 1979); *State v. Brown*, 371 So.2d 751 (La. 1979). Both cases involved the same prosecutor who essentially admitted that he systematically struck African-Americans from jury service. *Washington*, 375 So.2d at 1163-64.

Perkins, 105 F.3d at 978; *United States v. Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987). This finding is entitled to great deference because it largely turns on an evaluation of the credibility or demeanor of the attorney who exercises the challenge. *Hernandez v. New York*, 500 U.S. 352, 363, 111 S.Ct. 1859, 1869, 114 L.Ed.2d 395 (1991); *United States v. Bentley-Smith*, 2 F.3d 1368, 1373 (5th Cir. 1993). In a federal habeas case, such a finding will not be disturbed "unless it constitutes an unreasonable determination of the facts in light of the evidence presented in the prior state court proceeding." 28 U.S.C. § 2254(d)(2); *see also Carter*, 110 F.3d at 1104.

B. State Court Proceeding

Petitioner, an African-American, was charged with intentionally causing the death of a hotel clerk during the course of a robbery. The state sought the death penalty. Jury selection began on February 3, 1986 and continued through March 5, 1986. The original venire consisted of 108 prospective jurors, including 18 African-Americans. Six of the African-American jurors were excused by agreement of the parties and one was struck for cause.[3] Both sides were then allowed 15 peremptory challenges. The prosecution used 10 strikes against African-Americans. The defense exercised all 15 of its challenges against non-minorities. One African-American was seated on the jury.[4]

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[3] The record shows that petitioner agreed to excuse Hilbert Gitchaway, Dora Randle, Vergie Miller, Jerry W. Moseley, Lourice Collier, and Johnnie Holman. (Pet. Supp. Brief, App. 1 at 60). Virginia Smith was struck for cause because of her views on the death penalty. (SF Voir Dire-II 1006).

[4] The only African-American not challenged by the prosecution, Troy L. Woods, was the quintessential state's juror. When asked about his feelings on capital punishment, Woods stated:

> It's too quick. They don't feel the pain . . . Well, what I call punishment is back to the old Indian days. Pour some honey on them and stake them out over an ant bed. That's the way I feel about it. That's what I call punishment.

(SF Voir Dire-X 3848).

On March 9, 1986--just four days after the jury was empaneled--the *Dallas Morning News* ran a front-page story about jury selection practices in Dallas County criminal cases. *See* Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds*, DALLAS MORNING NEWS, March 9, 1986 at A1. (Am. Petition, Exh. 3). The newspaper article examined the racial and ethnic composition of juries in 100 randomly selected felony trials between 1983 and 1984. Of 467 African-American jurors qualified to serve in those cases, 405 were peremptorily challenged by the state. The study found that African-Americans were five-times more likely to be removed from a jury panel than whites, and twice as likely to be struck as Hispanics. Indeed, 70 of the 100 trials studied during the relevant time period had no African-American jurors at all.[5]

This article prompted defense counsel to file a motion to quash the jury panel. The motion was heard on March 12, 1986. At the hearing, petitioner attempted to show that the Dallas County District Attorney's office had an "unofficial policy" of excluding African-Americans from jury service. This policy dated back to the late 1950s, but was still being followed by some prosecutors at the time of petitioner's trial. Five current or former judges, two prosecutors, and two defense lawyers testified at the hearing.[6] One witness, former Assistan. District Attorney Jon

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[5] The same authors also studied 15 capital murder trials in Dallas County between 1980 and 1986. *See* Ed Timms & Steve McGonigle, *A Pattern of Exclusion: Blacks Rejected from Juries in Capital Cases*, DALLAS MORNING NEWS, Dec. 21, 1986 at A1. (Am. Petition, Exh. 10). Of 62 African-Americans qualified to serve as jurors in those cases, 56 were struck by the state with peremptory challenges. Only five African-Americans served on capital murder juries during this time period. While five of the 15 cases involved African-American defendants, four of those defendants were tried by all-white juries. Ironically, petitioner was the only African-American defendant to have a trial before at least one member of his own race.

[6] Among the witnesses to testify at the hearing was Jack Hampton, presiding judge of the 283rd Judicial District Court. Judge Hampton served as an Assistant District Attorney in the late 1950s. He recalled being reprimanded by District Attorney Henry Wade after allowing an African-American woman to serve on a jury in a DWI case. (SF-3/12/86 Hrg. 59-60). Significantly, Wade still served as Dallas County District Attorney when petitioner was tried in March 1986.

Sparling, testified about a memo he wrote in 1969 on jury selection in criminal cases. (SF-3/12/86 Hrg. 27-57 & Def. Exh. 1). This 19-page document is punctuated with racial, ethnic, religious, and gender-based stereotypes. For example, Sparling advises prosecutors that "[w]ho you select, and what you qualify the panel on will depend on the type of crime, the age, *color* and sex of the [d]efendant . . ." (*Id.*, Def. Exh. 1 at 301) (emphasis added). He goes on to state that "[y]ou are not looking for any member of a minority group which may subject him to oppression" because "[m]inority races almost always empathize with the [d]efendant."[7] (*Id.*, Def. Exh. 1 at 303, 305). Sparling testified that his memo was used to train misdemeanor prosecutors and became part of a manual distributed to all members of the Dallas County District Attorney's office. (*Id.* at 29-30).

At the conclusion of the hearing, the trial judge found that there was "no evidence presented to me that indicated any systematic exclusion of blacks as a matter of policy by the District Attorney's office." (*Id.* at 146). He therefore concluded that petitioner failed to establish a *Swain* violation. (*Id.*). The case proceeded to trial and petitioner was convicted of capital murder on March 26, 1986. One month later, the Supreme Court decided *Batson*.

On direct appeal, petitioner challenged the jury selection process under the more liberal *Batson* standard.[7] The Texas Court of Criminal Appeals found that petitioner had established an

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Other witnesses testified about more recent incidents of purposeful discrimination against African-American jurors. Harold Entz, presiding judge of Dallas County Criminal Court No. 4, said that one of his prosecutors wanted to shuffle a jury panel "because a predominant number of the first six, eight, or ten jurors were blacks." (*Id.* at 104). This occurred within the past "three or four years." (*Id.* at 103). Another judge, Ed Kinkeade, testified that he thought prosecutors had systematically excluded African-Americans from juries in his court. (*Id.* at 112-13). This observation was confirmed by Judge Larry Baraka, who barred a prosecutor from conducting voir dire in his court after an incident in 1985. (*Id.* at 74-75, 77). Judge Baraka admitted that there had been "a systematic exclusion of blacks by the State from juries" in the past. However, he thought "things had improved considerably" since about 1980. (*Id.* at 75-76).

[7] The Supreme Court has held that *Batson* applies retroactively to cases pending on direct review at the time it was decided. *See Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987). Consequently, petitioner was able to raise this claim for the first time on appeal.

inference of purposeful discrimination because the prosecutor used "such a skewed number of strikes on the black veniremen" and "only a single black juror was seated on the panel." *Miller-El v. State*, 748 S.W.2d 459, 460 (Tex. Crim. App. 1988). However, the prosecutor was never given an opportunity to explain his use of peremptory challenges. The case was remanded to the trial court with instructions to conduct a *Batson* hearing. *Id.* at 460-61.

This hearing was held on May 10, 1988. Paul Macaluso, the prosecutor who conducted voir dire, testified as to his reasons for striking each of the 10 African-Americans from the jury panel. The trial court determined that these explanations were race-neutral and negated any inference of purposeful discrimination.[8] Specifically, the court found that: (1) none of the explanations given by the prosecutor were based on group traits; (2) none of the jurors were questioned perfunctorily; (3) there was no disparate examination of the jurors; and (4) the primary reason given to support each peremptory challenge, the juror's reluctance to assess the death penalty, was closely and directly related to the facts of the case. (Supp. Tr. at 6-7). Petitioner challenged these findings on direct appeal. However, the Texas Court of Criminal Appeals found that the prosecutor's explanations were not "patently implausible or so contrary to the evidence as to be unworthy of belief as a matter of law." *Miller-El v. State*, No. 69,677, op. at 2 (Tex. Crim. App. September 16, 1992).

C. *Swain* Claim

Petitioner seeks federal habeas relief under both *Swain* and *Batson*. He argues that these cases have distinct applications and provide independent grounds for challenging discriminatory

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[8] The trial court also found that petitioner failed to raise an inference of purposeful discrimination through the state's use of peremptory challenges. (Supp. Tr. at 4). However, this finding appears to be contrary to the decision of the Texas Court of Criminal Appeals. *See Miller-El*, 748 S.W.2d at 460 ("We find that appellant has established an inference as required by the *Batson* court.").

jury selection practices. Petitioner urges this dichotomy so he can take advantage of dicta in *Swain* analogizing a Fourteenth Amendment equal protection case to a Sixth Amendment fair cross-section claim once a *prima facie* showing of systematic discrimination has been made.[9] Since such evidence was presented in this case, petitioner maintains that he is entitled to an inference that the prosecutor used his peremptory challenges in a racially discriminatory manner.

This argument fails for several reasons. First, petitioner misreads *Swain*. While recognizing that "[t]otal exclusion of Negroes by the state officers responsible for selecting names of jurors gives rise to a fair inference of discrimination on their part," the Supreme Court held that "this rule of proof cannot be woodenly applied to cases where the discrimination is said to occur during the process of peremptory challenge of persons called for jury service." *Swain*, 85 S.Ct. at 839. The Court went on to explain:

> Unlike the selection process, which is wholly in the hands of state officers, defense counsel participate in the peremptory challenge system, and indeed generally have a far greater role than any officers of the State. It is for this reason that a showing that Negroes have not served during a specified period of time does not, absent a sufficient showing of the prosecutor's participation, give rise to the inference of systematic discrimination on the part of the State.

Id. Thus, *Swain* rejected any analogy to fair cross-section cases without proof that the prosecutor systematically used peremptory strikes against minorities over a period of time. *Id.* at 839-40. Historical evidence, standing alone, was never enough to prove a *Swain* violation.

Nor is there any authority for the proposition that *Swain* somehow survives *Batson*. In fact, *Batson* specifically overruled *Swain*. *Batson*, 106 S.Ct. at 1725 n.25 ("To the extent that

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[9] The Sixth Amendment guarantees a defendant the right to trial by an impartial jury "drawn from a fair cross-section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 536, 95 S.Ct. 692, 700, 42 L.Ed.2d 690 (1975).

anything in [*Swain*] is contrary to the principles we articulate today, that decision is overruled."). Moreover, the two cases are wholly complementary with regard to their treatment of historical evidence. Under *Swain*, a defendant was required to prove systematic discrimination as a prerequisite to an equal protection claim. *Swain*, 85 S.Ct. at 837-38. This requirement was abolished in *Batson*. *Batson*, 106 S.Ct. at 1722. However, historical evidence can still be used to establish a *prima facie* case of discrimination in the jury selection process. *Id.* at 1721-22. A defendant may show that the prosecutor in his case had a practice of striking minority jurors over a period of time. It then becomes incumbent upon the prosecutor to explain his use of peremptory challenges in light of that fact. Regardless of the type of evidence presented, the standard of proof remains the same. It makes no difference whether the defendant's *prima facie* case is based on historical evidence or the actions of the prosecutor at trial. The court must consider the "totality of relevant facts" in determining whether purposeful discrimination exists in any particular case.

Finally, the Supreme Court has held that a defendant may not challenge the composition of a petit jury on the grounds that it does not represent a fair cross-section of the community. *Holland v. Illinois*, 493 U.S. 474, 487, 110 S.Ct. 803, 811, 107 L.Ed.2d 905 (1990). Rather, such a claim applies only to the venire from which the jury is ultimately selected. *Id.*, 110 S.Ct. at 807. It therefore follows that the standards governing a fair cross-section claim under the Sixth Amendment are not applicable to an equal protection claim under the Fourteenth Amendment. *Cf. id.* at 806 (rejecting invitation to extend *Batson* standards to Sixth Amendment fair cross-section claims).

The Court concludes that *Swain* does not provide an independent basis for challenging the prosecutor's use of peremptory challenges in this case. Petitioner's equal protection claim must be analyzed under the standard of proof articulated in *Batson*.

D. *Batson* Claim

Petitioner characterizes the evidence supporting his equal protection claim as "copious and multifaceted." (Am. Petition at 15). This is an understatement. His amended petition contains 202 pages of argument on this point, with citations to numerous state and federal authorities. Succinctly stated, petitioner contends that the jury selection practices employed by the state in his case were unconstitutional because: (1) the prosecutors had a documented history of using peremptory challenges against minorities in other cases; (2) African-American jurors were subjected to disparate questioning on the issue of minimum punishment; and (3) the state accepted non-minority jurors with the same characteristics as African-Americans who were struck by the prosecution. A brief discussion of these arguments, none of which were presented to the state court, is necessary to the disposition of this claim.[10]

1. Other Cases

Petitioner maintains that two of the prosecutors in his case, Paul Macaluso and Jim Nelson, "had a history of discriminating against African Americans in jury selection and that this practice continued at his trial." (Am. Petition at 59). As proof of discriminatory intent, he cites two other cases involving the same prosecutors. *Chambers v. State*, 784 S.W.2d 29 (Tex. Crim. App. 1989), *cert. denied*, 110 S.Ct. 2602 (1990); *Dorothy Jean Miller-El v. State*, 790 S.W.2d 351 (Tex. App.–Dallas 1990, pet. ref'd).[11] Both cases were reversed for *Batson* violations. Even assuming that this evidence constitutes a pattern of systematic discrimination, it is only relevant

[10] The Court asked the parties to brief the issue of whether petitioner fairly presented the factual basis of his "improper questioning" and "comparative juror analysis" claims in state court. *See* ORDER, 7/28/99. Respondent conceded that these arguments "are subsumed within the broad *Batson* issue and are not tantamount to the presentation of a new claim." (Resp. Supp. Brief at 2). Therefore, the Court will consider these claims on the merits.

[11] Dorothy Jean Miller-El is petitioner's wife. She was convicted of murder and attempted capital murder in a separate trial.

in determining whether petitioner has established a *prima facie* case under *Batson*. The state court already found that petitioner has met this burden. *Miller-El*, 748 S.W.2d at 460. Consequently, the focus shifts to the explanation proffered by the prosecution for its use of peremptory challenges. Historical evidence is of limited value in assessing whether the race-neutral explanations articulated by the prosecutor were a pretext for discrimination *in this case*.

2. Improper Questioning

Petitioner also contends that all African-American jurors were subjected to disparate questioning on the issue of minimum punishment. He points out that non-minority "pro-death penalty" jurors were fully informed of the range of punishment for murder and asked whether they could keep an open mind on the subject. However, the prosecutor posed the same question to non-minority "anti-death penalty" jurors and *all* African-American jurors in an open-ended manner. These jurors were asked, "What do you personally feel ought to be the minimum punishment for somebody committing a murder?" (SF Voir Dire-I 307-17). Most of the jurors responded with sentences well in excess of the statutory minimum of five years. When the prosecutor informed the jurors of the actual range of punishment, many felt that the minimum sentence was too lenient. As a result, they effectively disqualified themselves from serving on the jury.[12]

Obviously, petitioner intends to show that the prosecutors were of a mind to discriminate. However, no African-American jurors were peremptorily challenged because of their views on minimum punishment. Nor were any African-Americans struck for cause on that basis. Once again, the relevant inquiry in this case is whether the race-neutral explanations proffered by the

[12] Texas law allows the prosecution to challenge a prospective juror who demonstrates "bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment." TEX. CODE CRIM. PROC. ANN. art. 35.16(b)(3) (Vernon 1989). Thus, the state may strike a juror who cannot agree to consider the minimum punishment. *Phillips v. State*, 701 S.W.2d 875, 884 (Tex. Crim. App. 1985), *cert. denied*, 106 S.Ct. 3285 (1986).

state for its use of peremptory challenges were pretextual. If those reasons withstand scrutiny, there is no equal protection violation. Any evidence about the prosecutor's motivation for asking a question that did not form the basis of a peremptory challenge is simply irrelevant.

3. Comparative Juror Analysis

The prosecutor explained that he struck nine African-American jurors because of their attitude toward the death penalty or their reluctance to serve on a death penalty jury.[13] Another African-American was struck because of her views on rehabilitation. Petitioner contends that these explanations were pretextual because non-minorities with the same or similar characteristics were accepted by the state. Consideration of this argument requires a careful review of the voir dire examination of each challenged juror.

a. Juror Bozeman

Roderick Bozeman was the seventh juror on the venire panel and the first African-American questioned. Bozeman said that he believed in capital punishment, but might have a problem sitting on a death penalty jury. (*Id.* at 282). When asked to explain his answer, Bozeman stated:

> It would be actually the weight of, I guess, thinking about the death penalty and that would be the real thing behind it, I guess. I wouldn't have any problem serving on the jury, I don't think.

(*Id.* at 284). The prosecutor then inquired whether Bozeman could answer the special issues on punishment based solely on the evidence presented at trial, "knowing full well that [it might] result

[13] Petitioner admits that four African-American jurors--Linda C. Baker, Anna L. Keeton, Paul Bailey, and Janice Mackey-- were properly challenged because of their extreme reluctance to serve on a death penalty jury. (Am. Petition at 135 n.52).

in the execution of somebody who you personally don't desire to be executed." (*Id.* at 301).[14] Bozeman responded:

> I don't know. I would like to think I could, but I don't think I could. If I didn't feel like he deserved it, I don't think I could go for the death penalty.

(*Id.*). A short time later, Bozeman changed his answer. He said, "I'd have to vote with the proof, you know, no matter how I felt. If the answer was yes, then I would have to put yes no matter how I felt about it." (*Id.* at 306). The prosecutor struck Bozeman based on his "feelings on the death penalty" and his "obvious hesitation." (*Id.* at 323).

Petitioner contends that these reasons were pretextual because five non-minority jurors accepted by the prosecution also had misgivings about the death penalty or their ability to serve on the jury.[15] However, such a subjective consideration is not easily assessed from a cold record. *See United States v. Alston*, 895 F.2d 1362, 1367 n.5 (11th Cir. 1990) ("The attributes relied upon by the prosecutor in striking potential jurors are not always easily compared . . . and often require an evaluation of the degree to which the prospective juror manifests the stated attribute.").

[14] Three special issues are submitted to the jury at the conclusion of the punishment phase of a capital murder trial. These questions are:

> (1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> (2) Whether there is a reasonable probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?
>
> (3) Whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased?

TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(Vernon 1981). An affirmative finding on all three issues by a unanimous jury results in a death sentence. *Id.* art. 37.071(e).

[15] These jurors are identified as Noad O. Vickery, Ronald Salsini, Marie H. Mazza, Gwendolyn Smale, and Joan Weiner. Ironically, petitioner struck Vickery, Salsini, and Smale. (Pet. Supp. Brief, App. 1 at 0059).

Disparate treatment cannot automatically be imputed in every situation where the state rejects one juror with the same characteristics as another juror who is accepted. Indeed, the decision to strike a particular juror "may be influenced by intuitive assumptions that are not fatally suspect merely because they are not quantifiable." *United States v. Lance*, 853 F.2d 1177, 1181 (5th Cir. 1988). *See also Matthews v. Evatt*, 105 F.3d 907, 918 (4th Cir.), *cert. denied*, 118 S.Ct. 102 (1997) (both prosecutor and defense counsel must be allowed to make credibility determinations when exercising peremptory challenges).

The record does not reflect the demeanor of Bozeman or the non-minority jurors who expressed doubts or hesitancy about the death penalty. The tone of voice, facial expressions, and other physical qualities of these juror all bear on the assessment of whether their hesitation was merely passing or more deeply-rooted. The trial judge personally observed the proceedings and accepted the prosecutor's explanation for striking Bozeman. The Court must defer to that credibility determination. *Hernandez*, 111 S.Ct. at 1869; *Bentley-Smith*, 2 F.3d at 1373.

Nor is the fact that Bozeman later affirmed his ability to assess the death penalty necessarily dispositive. The use of peremptory challenges is often influenced by intuitive assumptions. *Lance*, 853 F.2d at 1181. The prosecutor is certainly allowed to conclude that a juror's initial indecision may not bode well for the state. *See Caldwell v. Maloney*, 159 F.3d 639, 655-56 (1st Cir. 1998), *cert. denied*, 119 S.Ct. 1152 (1999) ("[T]he prosecutor 'had no obligation either to ignore [the juror's comments about her reluctance] or to accept at face value [the juror's] prediction that, in the end, [she] could put aside [her] problem and do it right.'") (citation omitted). Such "gut reactions" are the essence of a peremptory challenge.

b. Juror Fields

Billy Jean Fields was the second African-American juror struck by the state. A

considerable portion of his voir dire examination focused on the special issue concerning future dangerousness. The prosecutor asked, "What sort of evidence do think would aid you . . . in deciding whether or not this is the type of individual that would probably do something of a criminal nature again?" (SF Voir Dire-I 419). Fields responded that he would want information about the defendant's background. (*Id.* at 420, 422). The following colloquy then occurred:

> Q: [BY PROSECUTOR]. Let me just ask you briefly: What does that word probability mean to you in that connotation?
>
> A: [BY JUROR]: Well, it means is there a possibility that he will continue to lead this type of life, will he be rehabilitated or does he intend to make this a life-long ambition.
>
> Q: Let me ask you, Mr. Fields, do you feel as though some people simply cannot be rehabilitated?
>
> A: No.
>
> Q: You think everyone can be rehabilitated?
>
> A: Yes.
>
> Q: I'm just curious. How would you ever know that there is somebody that--well, you said something earlier, but I can't remember exactly what it was, about whether or not somebody could be rehabilitated in conjunction with one of my questions earlier. You said that would tell you whether or not somebody could possibly be rehabilitated?
>
> A: Well, I think you're talking about the fact of whether or not it was premeditated. It may be far-fetched, but I feel like, if a person has the opportunity to really be talked about God and he commits himself, whereas he has committed this offense, then if he turns his life around, that is rehabilitation. . . . I feel like when an individual has really been truly reached by someone reading the word of God to him and they are repentant and they do have a real act of contrition, they can be rehabilitated and that's been demonstrated.

F.2d at 1181.[17]

c. Juror Warren

The state used its sixth peremptory challenge against Joe Warren, another African-American member of the venire panel. When asked by the prosecutor whether he felt the death penalty accomplished a particular purpose, Warren responded:

> Yes and no. Sometimes I think it does and sometimes I think it don't. Sometimes you have mixed feelings about things like that.
>
> * * * *
>
> I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment.

(SF Voir Dire-III 1532). At the *Batson* hearing, the prosecutor cited this answer as one of the reasons for striking Warren. (SF-5/10/88 Hrg. 31). He went on to explain that "at that point in the voir dire examination with nine strikes remaining, we thought it would be best to exercise a peremptory challenge. We did not think he would be a favorable juror for the State." (*Id.* at 32).

Petitioner points out that two non-minorities who had mixed feelings about the death penalty were not struck by the prosecution.[18] However, these jurors were not similarly situated to Warren. After stating that life imprisonment might be a fate worse than death, both non-minority jurors firmly asserted their belief that capital punishment was a deterrent to crime. (SF Voir Dire-III 3264-65; Voir Dire-VIII 1074-75). By contrast, Warren suggested that the death

[17] Petitioner argues that the other reason given by the prosecutor for striking Fields--that his brother had been convicted of a felony--was also pretextual. (SF Voir Dire-I 455). The Court need not address this argument in light of upholding the validity of the prosecutor's first explanation.

[18] These jurors are identified as Sandra Jenkins and Kevin Duke.

penalty might not serve any purpose. (*Id.* Voir Dire-III 1532). Clearly, his feelings on the subject were more ambivalent than the non-minority jurors accepted by the state. This indecision, coupled with the fact that the state still had nine peremptory strikes remaining, adequately supports the prosecutor's race-neutral explanation for challenging Warren.

d. Jurors Kennedy, Rand & Boggess

Three other African-American jurors--Wayman Kennedy, Edwin Rand, and Carrol S. Boggess--were struck by the prosecution because of their answers to certain questions about the death penalty. There is ample support in the record to support the exercise of these peremptory challenges.

All three jurors voiced concerns about sitting on a death penalty jury or imposing capital punishment in this type of case. Kennedy testified that the death penalty was only appropriate in "extreme cases . . . like a mass murder," and that a life sentence was sufficient for murder occurring during a robbery. (*Id.* Voir Dire-V 2176, 2178). He repeatedly refused to take a firm position on his ability to assess the death penalty until he heard the evidence. (*Id.* at 2182-94). Rand acknowledged that he had doubts about his ability to participate in assessing the death penalty. At first, he told the prosecutor that "somewhere along the line, I would probably think to myself, you know, 'Can I do this?' You know, right now I say I can, but tomorrow I might not." (*Id.* Voir Dire-IV 1805-06). Later, Rand said that he could impose a death sentence if warranted by the evidence. (*Id.* at 1809-11). Boggess was even more direct. Although she would serve on the jury if selected, Boggess said that "I wouldn't want to serve and I wouldn't want to have that responsibility to do that . . ." (*Id.* at 2008).

Petitioner argues that the views expressed by these African-American jurors were similar to those of non-minorities who were accepted by the state. However, the record does not support

this assertion. None of the non-minority jurors identified by petitioner ever said that the death penalty was not appropriate for a murder committed during the course of a robbery or that they did not want to serve on the jury. Moreover, some of the African-American jurors were struck because of their reluctance or hesitancy in answering questions about the death penalty. These subjective qualities are best judged by the trial court. *See Hernandez*, 111 S.Ct. at 1869; *Bentley-Smith*, 2 F.3d at 1373.

4. Conclusion

Petitioner has adduced a considerable amount of evidence showing that the Dallas County District Attorney's office had an unofficial policy of excluding African-Americans from jury service in years past. There is no other explanation for the appalling statistics brought to light by the *Dallas Morning News* in March 1986. Several judges and defense lawyers confirmed that prosecutors often used peremptory challenges against African-Americans and other minorities for no apparent reason other than race. Then there is the "Sparling Memo"--the article on jury selection that taught Dallas County prosecutors to strike prospective jurors on the basis of race, religion, ethnicity, and gender. Although this evidence is disturbing, it is not dispositive of petitioner's *Batson* claim.

In order to prove an equal protection violation, petitioner must show that the prosecutor used peremptory challenges to purposefully exclude African-Americans from the jury in *his case*. The historical evidence cited by petitioner helps him establish a *prima facie* case of discrimination. However, he also must demonstrate that the race-neutral explanations offered by the prosecution were merely pretextual. This heavy burden is heightened by the onerous standard of review in federal habeas cases. Here, the trial court found that "the primary reasons for the exercise of the challenges against each of the veniremen in question, their reluctance to assess or reservations

concerning the imposition of the death penalty, were closely and directly related to the facts of the case" and negated any inference of discrimination. (Supp. Tr. at 6-7). The record supports this determination. Consequently, the finding is not "unreasonable." *See* 28 U.S.C. § 2254(d); *Drinkard*, 97 F.3d at 769. This ground for relief is without merit and should be overruled.[19]

V.

CHALLENGE FOR CAUSE
(Ground 5)

Next, petitioner contends that the trial court improperly excused a prospective juror for cause based on her reluctance to impose the death penalty.

A. Applicable Law

The Sixth Amendment to the United States Constitution guarantees a defendant the right to trial by an impartial jury. U.S. CONST. amd. VI. This prevents the imposition of punishment in a capital case by a jury organized to guarantee a death sentence. *Witherspoon v. Illinois*, 391 U.S. 510, 521-22, 88 S.Ct. 1770, 1776-77, 20 L.Ed.2d 776 (1968). Still, a potential juror may be excused for cause if his views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985), *quoting Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980). Juror bias need not be proved by "unmistakable clarity." *Witt*, 105 S.Ct. at 852. Rather, the trial judge has discretion to determine whether a prospective juror can faithfully and impartially apply the law. *Id.* at 852-53.

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[19] The Court also notes that an African-American served on the jury. The Fifth Circuit has suggested that this may be sufficient to negate a claim of purposeful discrimination. *See United States v. Ratcliff*, 806 F.2d 1253, 1256 (5th Cir. 1986), *cert. denied* 107 S.Ct. 1625 (1987) (no hint of racial discrimination where two of the remaining twelve jurors were black).

This determination is entitled to a presumption of correctness and should be reversed only in a "clear case." *Id.* at 854 n.9, *quoting Reynolds v. United States*, 8 Otto 145, 98 U.S. 145, 156-57, 25 L.Ed. 244 (1879).

B. Discussion

All potential jurors were questioned about their feelings on capital punishment. One juror, Joyce Willard, explained her views on the subject as follows:

> Well, I feel that--of course, I know the bible says an eye for an eye and a tooth for a tooth, but to go further into detail, I feel like if you go and have premeditated thoughts about doing somebody bodily injury, then yes I do believe in the death penalty. If murder was not the utmost in your mind, them I'm not real sure what I--I don't know if I can give you an answer on that or not. I have mixed emotions about that.

(SF Voir Dire-VIII 3092). Willard later expressed reservations about imposing the death penalty for a murder that was not "premeditated." (*Id.* at 3095-96). The prosecutor told Willard that premeditation was not an element of capital murder. Rather, the state was only required to prove that the defendant "did knowingly or intentionally cause the death of an individual" while in the course of committing robbery. (*Id.* at 3098-99). After the prosecutor explained the elements of the offense in more detail, Willard said:

> [I]f it is proven and you have proved that this gentlemen has done these two things, if he went in there and intentionally caused someone--in the process he killed someone and it was proven that this happened--I don't know if there were any witnesses or what, but--I would have to go along with the death penalty then.

(*Id.* at 3102). The prosecutor then asked Willard if she could serve on a death penalty jury. At first she replied:

> That is very difficult for me to decide. Like I say, a human life is on trial here. I know one has been taken and I don't believe in taking a human life, of course. I have always had kind of mixed emotions, but I felt like somebody who took someone's life should be assessed the death penalty. Like I say, I don't--I may be contradicting what I told you before. I don't know if I could really assess the death penalty to another human life. If it came down to the point where it was proven to me beyond a shadow of a doubt that he was guilty, then I'm sure I could.

(*Id.* at 3106-07). Willard became equivocal upon further questioning by the prosecutor. (*Id.* at 3110-113). When pressed for a definite answer as to her ability to serve on the jury, Willard responded "no." The prosecutor then asked:

> Are you telling me that you would not take the oath because you don't feel like you are suited or you can serve on this type of a jury? If you're telling me that, that's fine.

Willard answered, "I believe that's what I'm telling you." (*Id.* at 3117).

Defense counsel attempted to rehabilitate this juror. He asked whether she could follow her oath by rendering a verdict based on the law and the evidence. Willard responded:

> If I were on the jury and had to be a part of rendering the verdict, I guess it would be--it would be difficult to render a verdict even though, like I told you, I do believe in capital punishment. If that was what was necessary to do and I were on the jury, I probably could go along even though it would be with me for the rest of my life.

(*Id.* at 3122). Willard continued to speculate as to her ability to take the oath. At one point Willard told defense counsel that she "would have to take the oath before I could be on the jury," but "I wouldn't want to." (*Id.* at 3124, 3127-28).

Eventually, the trial court intervened. The judge asked Willard if her personal feelings would interfere with her judgment about the law and the evidence in the case. Willard said, "Well, knowing me I would probably break down." (*Id.* at 3143). However, she reluctantly acknowledged her ability to answer the special issues based on the evidence. (*Id.* at 3148-49).

The judge then asked:

> Q: [THE COURT]: [C]an you take the oath to follow the law and then discharge your duties as a juror or can you not take an oath and do that, that is discharge your duties as a juror, whatever they may call you to do? Can you give me a yes or no and there won't be any more questions?
>
> A: [WILLARD]: I guess I better answer you no.
>
> Q: Ms. Willard, no, you could not take the oath, right?
>
> A: I don't guess I could after all these things have been put to me. I thought maybe I could, but after the way things have been presented to me and the way I'm understanding things, if I'm understanding correctly, then I don't believe I could.
>
> Q: One final quibble with you. You used the words I think and unfortunately--you said no and then you said I think. Is it no, I cannot do it or yes, I can do it or--
>
> A: Okay. We'll put no I cannot do it.

(*Id.* at 3150-51).

The trial court excused Willard for cause. Petitioner now contends that Willard only began expressing doubts about her ability to sit on the jury after the prosecution presented a distorted and manipulative view of Texas law. He accuses the prosecutor of attempting to sow artificial doubt in the mind of this juror by "hammer[ing] home the grisly realities of the death sentence, while offering [her] an 'escape hatch' to avoid jury service by implying that she need not serve if doing so would trouble her conscience." (Am. Petition at 293). The Court has carefully reviewed the voir dire examination and finds no evidence of impropriety. Evidently, neither did defense counsel since he never objected to any of the prosecutor's questions. The lengthy colloquies involving Willard's ability to take the oath and serve on the jury were the result of her own indecision and equivocation--not any improper questioning by the prosecutors.

Petitioner further argues that there was no legal basis to strike Willard for cause. He points out that Willard believed in capital punishment. She merely "expressed hesitation and emotional turmoil at the prospect of rendering a verdict that would result in another person being killed." (Am. Petition at 303). If this were the extent of her testimony, Willard might not be disqualified. *See, e.g. Alderman v. Austin*, 663 F.2d 558, 563 (5th Cir. 1981), *aff'd on reh'g*, 695 F.2d 124 (5th Cir. 1983) (jurors who favored capital punishment and could vote to inflict the death penalty were not disqualified because of inability to sign verdict form). However, Willard also stated that she could not take the oath and discharge her duties as a juror. At best, her testimony was ambiguous and contradictory. (SF Voir Dire-VIII 3146, 3148-49, 3115, 3127). The trial court struggled with this issue and concluded that "[Willard's] view about participating in the death penalty process would prevent or substantially impair her performance of her duties as a juror in this case." (*Id.* at 3155). As the Supreme Court has noted:

> What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear;" these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . *[T]his is why deference must be paid to the trial judge who sees and hears the jurors.*

Witt, 105 S.Ct. at 852 (emphasis added). Such is the case here. The trial judge had an opportunity to observe Willard's demeanor and assess her credibility. He ultimately concluded that she could not take the oath and accept the duties of her office. Petitioner has failed to establish that this determination was "unreasonable . . . . in light of the evidence presented in the

state court." 28 U.S.C. § 2254(d). This ground for relief should be overruled.[20]

VI.

COMPETENCY
(Grounds 3 & 4)

Petitioner raises two arguments regarding his mental competency. First, he contends that the trial court should have conducted a competency hearing. Second, he claims that he was not competent to stand trial.

A. Applicable Law

Due process prohibits the trial of a defendant who is mentally incompetent. *Godinez v. Moran*, 509 U.S. 389, 396, 113 S.Ct. 2680, 2685, 125 L.Ed.2d 321 (1993); *Pate v. Robinson*, 383 U.S. 375, 378, 86 S.Ct. 836, 838, 15 L.Ed.2d 815 (1966). This means that a defendant must have the "capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense . . ." *Drope v. Missouri*, 420 U.S. 162, 171, 95 S.Ct. 896, 903, 43 L.Ed.2d 103 (1975). *See also Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960). The burden of establishing mental incompetency is extremely heavy. In order to obtain habeas relief, a petitioner must show that "the facts are 'sufficient to positively, unequivocally and clearly generate a real, substantial and legitimate doubt' as to his mental competency at the time of trial." *Dunn v. Johnson*, 162 F.3d 302, 306 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 1507 (1999), *quoting Washington v. Johnson*, 90 F.3d 945, 950 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 1259 (1997).

State courts must employ procedures designed to protect against the trial of incompetent defendants. *Drope*, 95 S.Ct. at 904-05; *Pate*, 86 S.Ct. at 842-43. A competency hearing is required "if the evidence raises a bona fide doubt as to the defendant's competency at that time." *Lokos v. Capps*, 625 F.2d 1258, 1261 (5th Cir. 1980). The trial court should consider: (1) any history of irrational behavior; (2) the bearing and demeanor of the defendant in court; and (3) prior medical opinions. *See Dunn*, 162 F.3d at 305; *Reese v. Wainwright*, 600 F.2d 1085, 1091 (5th Cir.), *cert. denied*, 100 S.Ct. 487 (1979).

B. Medical Evidence

Petitioner was shot by Houston police officers at the time of his arrest on November 21, 1985.[21] He sustained serious abdominal injuries and was taken to Ben Taub Hospital for treatment. Surgeons removed part of his intestines, repaired damage to his internal organs, and performed a double-barreled colostomy. Petitioner remained hospitalized for eight weeks. During this time, he experienced complications and underwent an exploratory laparotomy to remove adhesions. Petitioner lost a total of 57 pounds during his hospital stay. He was eventually discharged to the custody of Harris County officials on January 12, 1986. (Am. Petition, Exh. 18).

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[20] Although not mentioned in his brief, petitioner has provided the Court with a copy of the Findings and Recommendation of Magistrate Judge Charles Bleil in *Troy Dale Farris v. Gary Johnson*, No. 4-94-CV-0142-Y (N.D. Tex. January 21, 1997) (Am. Petition, Exh. 35). The issue presented in *Farris* is similar to the one raised by petitioner in the instant case–whether a prospective juror was improperly excused for cause based on her opposition to the death penalty. Judge Bleil noted that the juror consistently maintained she could answer the special issues on punishment and follow the law given by the court. Consequently, there was no legal basis to challenge the juror for cause. *Farris*, No. 4-94-CV-0142-Y, op. at 55-56.

Unlike the juror in *Farris*, Joyce Willard said that she could *not* take the oath or discharge her duties as a juror. This fact alone distinguishes the two cases. More importantly, Judge Bleil's recommendation was rejected by the district judge. *Farris v. Johnson*, 967 F.Supp. 200, 206 (N.D. Tex. 1997), *aff'd*, 144 F.3d 50 (5th Cir.) (Table), *cert. denied*, 119 S.Ct. 516 (1998). Therefore, *Farris* does not dictate a contrary result.

[21] Petitioner fled to Houston after he killed a motel clerk in Irving, Texas. He was apprehended five days later by Houston police officers. The shooting occurred when petitioner approached one of the officers with a KG99 machine gun as he was attempting to evade arrest. (SF Trial-II 687, 698-704).

Four days later, petitioner arrived at the Dallas County Jail. He complained of pain at his colostomy site and swollen extremities. Petitioner was treated with a variety of medications and placed on a double portion diet to regain weight. Jail records show that petitioner began experiencing chest pain on January 21, 1986. The next day, his symptoms included "chills and fever." Petitioner was given Motrin and Septra, an antibacterial medication. A wheelchair was ordered so he could go to court. However, petitioner no longer needed a wheelchair by the time jury selection began on February 3, 1986. (*Id.*, Exh. 21 & 22).

At the end of the first week of jury selection, petitioner still had chest pain, chills, and fever. This prompted the trial judge to order a medical evaluation. (*Id.*, Exh. 21). Petitioner was taken to Parkland Hospital on February 10, 1986, where he was diagnosed with pneumonia. He was discharged the same day with a prescription for Darvocet and Erythromycin. (*Id.*, Exh. 24). Jury selection resumed the next morning.

Petitioner continued to complain of chest pain throughout the month of February. He also reported delays in the receipt of his medication.[22] On February 19, 1986, the trial judge asked the jail doctor to determine whether petitioner needed more pain medication for his "well-being." (*Id.*, Exh. 27). Dr. Adrian Collyns responded to this inquiry on February 24, 1986. He advised the judge:

> I have seen this man professionally on a number of occasions recently. A chest Xray on Feb. 21, 1986 was done. In my opinion he does not now require prescription pain killers.

(Am. Petition at 231).

[22] Petitioner alleges that the jail medical staff "continually failed to [administer] his antibiotics and pain medication on schedule." (Am. Petition at 227). The Court acknowledges that the medical records are less than clear on this point. However, this ambiguity does not necessarily establish that the medications were not given as directed.

The next day, defense counsel protested that petitioner had not been getting his medication on a regular basis. Petitioner then told the judge that he had not seen a doctor since his last visit to Parkland Hospital on February 10, 1986.[23] The judge replied:

> [THE COURT]: Mr. Cunningham and Mr. West, the only thing I can say–first of all, I received a letter from a Dr. Adrienne [sic] H. Collyns, which I'll make part of the Court's file, and it says in so many words, as of February 24th, he does not have the opinion that the Defendant needs pain killer prescriptions. Now, whether he needs other medicines, I don't know. I'm not obviously a doctor. I'm going to be guided by what the jail doctors say. If you-all have any suggestions, I'll be glad to help you in any way I can.
>
> [DEFENSE COUNSEL]: If he says as of February 24th, that would be yesterday and I don't know if the doctor would say that if he hasn't seen him.
>
> [THE COURT]: I got this letter delivered to me late yesterday afternoon after we recessed.
>
> [DEFENSE COUNSEL]: I would ask the Court to at least have whoever that doctor is examine Mr. Miller-El and I would also like to talk with him to see whether or not–what he is using to base that on for Mr. Miller-El's benefit because he tells Mr. West and he tells myself that he's hurting and he needs some medicine. We don't want him to think that we're not advising the Court.
>
> [THE COURT]: I'm advised and I'm pretty well guided by what the doctor says. Let me suggest that you and Mr. West talk to Dr. Collyns or the jail nurse up there and see what their answers are to your questions. If there is a dispute, I'll be glad–
>
> [DEFENSE COUNSEL]: Mr. West will track it down, Judge, and we'll go on with Ms. Williams.

(SF Voir Dire-VII 2782-84).

[23] Petitioner acknowledged that he had seen a nurse as recently as February 20, 1986, but "they say that they can't do nothing." (SF Voir Dire-VII 2782).

Petitioner was examined again by Dr. Collyns on February 26, 1986. He complained of constant chest pain that worsened at night. The doctor noted some tenderness and mild swelling over the right inferior scapula area. His lungs were clear with good breath sounds. Based on the results of this examination, Dr. Collyns concluded that petitioner was "fit to attend court." (Am. Petitioner, Exh. 21).

These symptoms persisted for several more days. During this time, petitioner continued to receive antibiotics and non-prescription medications. Then on March 4, 1986--just two days before jury selection concluded--petitioner was taken to Parkland Hospital for treatment of a chest abscess. He developed an infection and returned to the hospital six days later. A follow-up visit was scheduled for March 12, 1986. However, wound care was provided by the jail medical staff instead. (*Id.*, Exh. 21 & 22).

The next entry in petitioner's medical chart is dated March 20, 1986--one week after the trial began. Petitioner complained of soreness around his rib cage and asked to see a doctor. The next day, the following exchange occurred in open court:

> [PROSECUTOR]: Mr. Hall, you have previously identified the man *sitting* at the end of the table–
>
> [DEFENSE COUNSEL]: Your Honor, we'll object. He's not *sleeping*.
>
> [PROSECUTOR]: Well, he was when I was--
>
> [DEFENSE COUNSEL]: Your Honor, I would object to the side-bar remark.
>
> [THE COURT]: Sustained. Disregard that, ladies and gentlemen.

(SF Trial-III 1151) (emphasis added).[34] The trial court then recessed the proceedings until March 24, 1986.

Shortly after the trial resumed, the state concluded its case-in-chief. The defense rested without presenting any evidence and both sides closed. At that point, the trial judge advised petitioner of his right to testify and the consequences of doing so. Petitioner said that he understood his rights but did not want to testify. The court then stated:

> [THE COURT]: [I]t might be a bit late to ask this question, but I've seen no evidence that the Defendant is not competent to either stand trial or make these decisions on his own behalf
>
> [DEFENSE COUNSEL]: *Your Honor, to the best of my knowledge, Mr. Miller-El is competent and is aware of the facts and knows what is going on. Is that true, Mr. Miller-El?*
>
> [DEFENDANT]: *Yes.*
>
> [THE COURT]: Well, I'll note for the record that throughout the trial including voir dire that this Defendant appeared, from the bench, to participate actively with his lawyers in jury selection decisions and also during the trial as regards cross-examination of witnesses and such as that. Having heard nothing else, I'm going to find that he makes his decision competently and I, of course, will honor it.

(*Id.* at 1197-98) (emphasis added).

The guilt-innocence phase of the trial ended that day with a finding of guilt. Later that evening, petitioner complained of nausea and a problem with his colostomy bag. (Am. Petition, Exh. 21). The trial judge ordered a medical evaluation to determine whether petitioner was "able to sit thru court." (*Id.*, Exh. 29). Petitioner was taken to Parkland Hospital and kept overnight

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[34] It is not clear whether the prosecutor actually referred to petitioner as "the man *sleeping* at the end of the table" or whether defease counsel misunderstood the question. However, the record reflects that petitioner was seated at the end of the table next to his attorneys. (SF Trial-I 419).

for treatment of a small bowel obstruction. (*Id.*, Exh. 24).

The punishment phase of the trial commenced on March 25, 1986--the same day petitioner was released from the hospital. The following afternoon, the jury sentenced him to death. Petitioner continued to have problems with his colostomy bag and recurrent infections over the next eight months. His condition finally improved after surgeons closed his colostomies in November 1986. (*Id.*, Exh. 21, 24, 30-32).

C. State Habeas Proceeding

Petitioner did not challenge his mental competency on direct appeal. Instead, he first raised the issue in an application for writ of habeas corpus.[25] Petitioner alleged, *inter alia*, that he was not competent to stand trial due to his debilitating physical injuries, complications arising from his surgeries, and the side effects of pain medication. The state answered these allegations in a written response. Both parties submitted supplemental briefs and expert affidavits in support of their respective positions.

The state relied on the Affidavit of Steven P. Bowers, Medical Director for the Dallas County Jail System. Dr. Bowers reviewed selected portions of petitioner's medical records and a chronology of events prepared by the state. He noted that petitioner was on a number of medications during his trial. However, the only medication that might have affected him to any degree was Darvocet. Dr. Bowers explained that Darvocet is "relatively low in strength compared to other prescription pain medications." According to the medical records, petitioner received two Darvocet tablets three times a day. This is less than the maximum allowable dosage. Dr. Bowers found no indication that petitioner was impaired by any of his medications. He did not exhibit a

[25] Petitioner filed his application for post-conviction relief on May 16, 1995--nearly *nine years* after his trial concluded and just hours before his scheduled execution.

pattern of recurrent drowsiness, stupor, being difficult to arouse, or any bizarre behavior. Although petitioner was transported to the hospital several times during his trial, Dr. Bowers noted that each treatment was less than 24 hours in duration. This indicated that most of his medical problems were not serious. Based on this evidence, Dr. Bowers concluded that petitioner was competent to stand trial and assist in his defense. (Am. Petition, Exh. 25).

Petitioner countered with the Affidavit of Ari Kiev, a board-certified psychiatrist. Dr. Kiev reviewed all of petitioner's medical records and evidence submitted by both parties in the state habeas proceeding. This evidence showed that petitioner was in a weakened condition at the time of his discharge from Ben Taub Hospital on January 12, 1986. Petitioner was anemic, had a substantially reduced blood volume, and lost a considerable amount of weight. He also experienced complications with his colostomies, suffered from pneumonia, developed recurrent infections, and frequently complained of pain throughout the trial. Dr. Kiev noted that petitioner was medicated with Darvocet, which "can sometimes produce sedation and dizziness as side effects." He believed that petitioner may have experienced some of these symptoms while taking the medication. Dr. Kiev stated that the combination of these factors, together with an inadequate diet and sleep deprivation, "contributed to an inability of [petitioner] to participate fully and to the best of his normal abilities in the preparation and presentation of his own defense . . ." He then offered this rather bold assessment of petitioner's mental state:

> [Petitioner], because of the depressive effects of a prosthesis such as a colostomy, which reduces the recipient's ability to deal with stress, his physical debilitation and a depressive reaction secondary to his injury and circumstances, which produces apathy and lethargy, had given up and resigned himself to his fate, and was not showing any of the self protectiveness and survival instincts which would otherwise be normal under the circumstances.

Dr. Kiev surmised that petitioner "would have exhibited such a level of passivity and willingness to go along with whatever was offered that it amounted to an expression of suicidal intent to end his life." In his opinion, petitioner should have been evaluated to determine his mental competency. (*Id.*, Exh. 19).

The trial court resolved this conflicting evidence in favor of the state. Specifically, the court found that: (1) petitioner was legally competent both on and off his pain medication; (2) he had the capacity to understand the nature and object of the proceedings against him, consult with his attorneys, and assist in the preparation of his defense; and (3) a competency hearing was not required because "there was no 'bona fide doubt' as to [petitioner's] competence to stand trial." (*Id.*, Exh. 34 at ¶¶ 17-21). The judge based his findings on the exhibits submitted by both parties, the chronology of events prepared by the state, and his own recollection. After conducting an independent review of the record, the Texas Court of Criminal Appeals reached the same conclusion and denied habeas relief. *Ex parte Miller-El*, No. 31,001-01.

D. Discussion

Petitioner argues that the state habeas proceeding was flawed in four respects: (1) the chronology of events prepared by the state omitted significant information and misrepresented critical facts about his medical condition; (2) the Affidavit of Dr. Steven Bowers was incomplete and unreliable; (3) the trial court ignored his evidence; and (4) the state improperly submitted its proposed findings of fact and conclusions of law to the trial court *ex parte*. As a result of these defects, petitioner contends that he was denied a full and fair opportunity to litigate his competency claim in state court. He therefore seeks a *de novo* review in federal court.

A federal habeas petitioner is entitled to a *de novo* review of a state court's competency determination only "when he makes a showing by clear and convincing evidence to raise threshold

doubt about his competency." *Carter v. Johnson*, 131 F.3d 452, 460 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 1567 (1998), *quoting Lokos*, 625 F.2d at 1261. In order to raise such a doubt, a petitioner must present facts sufficient "to positively, unequivocally and clearly generate a real, substantial and legitimate doubt" concerning his mental capacity. *Carter*, 131 F.3d at 460 (citations omitted); *see also United States v. Williams*, 819 F.2d 605, 609 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 726 (1988). Petitioner has failed to meet this heavy burden. Nothing in the trial record suggests that he lacked the capacity to understand the proceedings, consult with his lawyers, or assist in the preparation of his defense. To the contrary, defense counsel told the trial judge that petitioner was competent to stand trial and make decisions on his own behalf.[25] Petitioner agreed with that assessment. (SF Trial-III 1198). This fact, standing alone, is persuasive evidence that no *Pate* violation occurred. *See, e.g. Moody v. Johnson*, 139 F.3d 477, 482 (5th Cir.), *cert. denied*, 119 S.Ct. 359 (1998); *Reese*, 600 F.2d at 1092.

Moreover, the trial judge had an opportunity to observe petitioner's demeanor and behavior on a daily basis over an eight-week period. The judge ordered at least two medical evaluations to determine whether petitioner was "able to sit thru court." (Am. Petition, Exh. 27 & 29). None of the doctors who examined petitioner raised any concerns about his mental competency. In addition, petitioner was questioned by his attorneys and the trial judge at various points throughout

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[25] E. Brice Cunningham, lead trial counsel for petitioner, told the state habeas court that he was unaware of the "full gravity" of his client's medical condition. Cunningham testified:

> After learning more about [petitioner's medical condition] at the time of his trial, Trial Counsel would have brought the matter of Mr. Miller-El's medical condition to the court's attention, requested a Hearing to determine this fact, and would have done whatever was possible to assure Mr. Miller-El's receiving the best possible medical attention, either in the Dallas County Jail, Parkland Memorial Hospital, or some other medical facility that could have dealt with his problem.

(Am. Petition, Exh. 28 at 6). Significantly, Cunningham never stated that these medical problems prevented petitioner from cooperating with his lawyers or assisting in the presentation of his defense.

the proceeding. He answered all questions in a direct and coherent manner."[7] This evidence further undermines petitioner's competency claim.

Petitioner points out that his expert, Dr. Ari Kiev, thoroughly reviewed all the medical evidence and concluded that he was mentally incompetent to stand trial. The Court acknowledges that the affidavit prepared by Dr. Kiev is more detailed than the affidavit submitted by Dr. Bowers. However, this does not require the trial court to credit his testimony. Although Dr. Kiev opined that petitioner was unable to "participate fully and to the best of his normal abilities in the preparation and presentation of his own defense," the trial judge was entitled to rely on his own observations and the testimony of Dr. Bowers in reaching a different conclusion. *See Carter*, 131 F.3d at 461. Moreover, the Fifth Circuit has twice found similar expert psychiatric testimony insufficient to prove a "real, substantial and legitimate doubt" concerning mental competency so as to overcome the presumption of correctness attached to state court findings. *See id.*; *Williams*, 819 F.2d at 608-09. The fact that the trial court did not mention Dr. Kiev's affidavit in its findings does not overcome this presumption. *See Carter*, 131 F.3d at 461.

Nor is the anecdotal evidence cited by petitioner sufficient to rebut the state court findings. Petitioner refers to his repeated requests for pain medication and a comment made by the prosecutor that he was sleeping in court. There is no doubt that petitioner experienced some pain as a result of his physical injuries, pneumonia, and recurrent wound infection. However, there is no objective medical evidence that this pain or the side effects of his medication prevented petitioner from assisting in the preparation and presentation of his defense. Similarly, the

[7] Petitioner attempts to minimize the significance of his answers by characterizing them as single-word responses. (Am. Petition 238 n.43). However, the record shows that petitioner answered several questions with complete sentences. (SF Voir Dire-III 2779-84; Punishment-II 17-19).

prosecutor's ambiguous remark hardly constitutes clear and convincing evidence of mental incompetency. A careful reading of the record discloses that the prosecutor never accused petitioner of sleeping in court. Rather, he asked if a witness could identify petitioner as "the man *sitting* at the end of the table." Defense counsel apparently misunderstood the question and pointed out that petitioner was "*not sleeping*." (SF Trial-III 1151) (emphasis added).

Petitioner has failed to show that there are sufficient facts to "positively, unequivocally and clearly generate a real, substantial and legitimate doubt" as to his mental competency at the time of trial. *Moody*, 139 F.3d at 481; *Carter*, 131 F.3d at 460. Therefore, any defects in the state habeas proceeding were immaterial. This ground for relief is without merit and should be overruled.

VII.

RELIGIOUS AFFILIATION
(Ground No. 6)

Finally, petitioner contends that the prosecutor improperly referred to his religious affiliation and disparaged his beliefs during the punishment phase of the trial.

A. Applicable Law

The First Amendment protects the right of an individual to join groups and associate with others holding similar beliefs. *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkley*, 454 U.S. 290, 294, 102 S.Ct. 434, 436, 70 L.Ed.2d 492 (1981). This precludes the state from introducing evidence of a defendant's "abstract beliefs" during the punishment phase of a criminal trial. *Dawson v. Delaware*, 503 U.S. 159, 168, 112 S.Ct. 1093, 1099, 117 L.Ed.2d 309 (1992). However, such evidence is admissible if it is sufficiently related to issues involved in the case. *Id.*, 112 S.Ct. at 1099; *Fuller v. Johnson*, 114 F.3d 491, 498 (5th Cir.), *cert. denied*,

118 S.Ct. 399 (1997); *Boyle v. Johnson*, 93 F.3d 180, 183 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 968 (1997).

B. Discussion

Petitioner belongs to a Muslim sect known as the Moorish Science Temple. Members of this religious group typically wear turbans and other distinctive articles of clothing. Approximately two weeks before the murder, petitioner attended a Moorish Feast at the Holiday Inn South in Irving, Texas. Two hotel employees identified petitioner as one of the participants at this function. Donald Ray Hall, the chief night auditor, testified that petitioner "was dressed in like a Moslim [sic] outfit and he had on a turban." (SF Trial-I 420). Philip Bond, the hotel manager, testified that several attendees "had turbans on their heads." (*Id.* at 27). Petitioner did not object to this testimony, and tacitly concedes that this evidence was admissible at the guilt-innocence phase of the trial to prove his identity.[23]

However, petitioner maintains that the prosecutor crossed the line when he questioned Stanley January during the punishment hearing. January testified that he met petitioner as part of a scheme involving illegal drugs. After January described his involvement in this scheme, the prosecutor inquired:

> Q: [BY PROSECUTOR]: Let me ask you: Did Thomas join some sort of political organization?
>
> A: [BY WITNESS]: Muslims, which is the Moorish Science Temple.
>
> Q: Temple of America?

[23] The trial court found that petitioner's affiliation with the Moorish Science Temple was relevant "to proving [his] identity as the person who committed the robbery/murder and to demonstrate the reliability of eyewitness Donald Hall's identification . . . " (Am. Petition, Exh. 34 at ¶ 111).

> A: Yes.
>
> Q: They are Muslims?
>
> A: Yes.
>
> Q: Did they attempt to get you to join their group?
>
> A: Well, me and Thomas Miller-El had a fall-out because he said that I wasn't into, you know, the Moorish Science Temple of America, and so by me not being into that, he just trusted me a little bit.

(SF Punishment-II 54-55). The prosecutor made two other references to petitioner's "so-called religious organization" while examining January. (*Id.* at 69, 80). He returned to this issue during closing argument:

> There's not a whole lot you can do for Don Hall, but there is about a million and a half other people that still live here and don't want this community turned into a war zone, where people like Miller-El can indulge in conduct that amounts to paramilitary activities, crime, whatever you want to call it: criminal behavior, whatever; whether it's political, philosophical, *religious or whatever*, if it's motivated by the facts in this case that show you it's uncontrollable and insatiable greed, nonetheless, it leaves in its wake what it left here.

(SF Punishment Arg. 5) (emphasis added).

The state court found that the prosecutor did not criticize or degrade petitioner's religious philosophy, beliefs, or practices. Moreover, the court found that the admission of this evidence did not inflame or prejudice the jury against petitioner on religious grounds. (Am. Petition, Exh. 34 at ¶ 85). Petitioner has failed to rebut these findings by clear and convincing evidence. The passing references to his "so-called religion" and possible religious motivation for the crime are

equivocal at best.[29] In addition, the jury was already aware of petitioner's religious affiliation because it was properly introduced into evidence during the guilt-innocence phase of the trial. Petitioner has failed to establish an error of constitutional magnitude that justifies federal habeas relief.

RECOMMENDATION

Petitioner's application for writ of habeas corpus should be denied.

DATED: January 31, 2000.

JEFF KAPLAN
UNITED STATES MAGISTRATE JUDGE

[29] Indeed, petitioner acknowledges that "it is impossible to determine what role the Moorish Science Temple evidence played in his death sentence." (Am. Petition at 336).

(14)

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUN 5 2000
NANCY DOHERTY, CLERK
BY
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THOMAS JOE MILLER-EL

Petitioner,

v.

GARY JOHNSON, Director, Texas Department of Criminal Justice Institutional Division

Respondent.

Civil No. 3:96-CV-1992-H

ENTERED ON DOCKET
JUN - 5 2000
U.S. DISTRICT CLERK

MEMORANDUM OPINION AND ORDER

This is a death penalty case.

Before the Court are the Findings and Recommendation of the United States Magistrate Judge, signed January 31, 2000; and Petitioner's Objections, filed February 25, 2000. Magistrate Judge Kaplan recommended that Miller-El's habeas corpus petition be denied. Pursuant to Fed. R. Civ. P. 72(b), this Court has made a de novo review of the portions of the Magistrate Judge's disposition objected to by Petitioner. Additionally, the Court heard oral argument from Petitioner and Respondent on April 25, 2000.

Based on the pleadings, evidence, and arguments of counsel, the Court hereby **ADOPTS** the findings and recommendation of the Magistrate Judge, except as **MODIFIED** below. Miller-El's petition for a writ of habeas corpus is **DENIED**.

I. ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT ("AEDPA") STANDARD

At the outset, the Court recognizes the recent changes in habeas jurisprudence. Pursuant to the AEDPA, a federal court may not grant habeas relief on any claim that was adjudicated on

the merits in a state court proceeding unless the petitioner shows that the prior adjudication: (1) resulted in a decision that was "contrary to, or involved an unreasonable application of, clearly established federal law;" or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Until very recently, the Fifth Circuit had held that an application of law to facts is not "unreasonable" unless "[the] state court decision is so clearly incorrect that it would not be debatable among reasonable jurists." *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996). The Supreme Court recently suggested that this standard is erroneous. *See Williams v. Taylor*, __ U.S. __, 120 S.Ct. 1495 (2000). In *Williams*, decided April 18, 2000, the Court criticized the Fifth Circuit's standard:

> The 'all reasonable jurists standard' would tend to mislead federal habeas courts by focusing their attention on a subjective inquiry rather than on an objective one. For example, the Fifth Circuit appears to have applied its 'reasonable jurist' standard in just such a subjective manner. *See Drinkard v. Johnson*, 97 F.3d 751, 769 (1996) ....

Williams, 120 S.Ct. at 1521-22. It appears that the *Drinkard* opinion has been overturned to the extent it required a subjective inquiry into what is an "unreasonable application" of facts to the law. The Supreme Court went on to ostensibly clarify that, under AEDPA, a state court decision may be incorrect or erroneous application of the law to the facts, but may not be an unreasonable application. *See Williams*, 12 S.Ct. at 1522.

The Magistrate Judge made his recommendation before *Williams v. Taylor* was decided, and cited the *Drinkard* "reasonable jurists" standard of review. Therefore, the Court modifies the portions of the Magistrate Judge's recommendation that rely on *Drinkard*. (Magistrate's Findings

at 3, 23). However, upon review of the pleadings, the Court finds that the change in the standard review has no determinative effect on the findings of the Magistrate Judge.

II. BATSON[1] AND SWAIN[2] CLAIMS

A. Swain claim

The Court agrees with the Magistrate Judge that *Swain* does not provide an independent basis for challenging the prosecutor's use of peremptory challenges, and that Petitioner's claim must be analyzed under *Batson*. In each of the cases cited by Petitioner that allow relief under *Swain* (Petition at 179, 184; Objections at 9 n. 4), *Batson* was found inapplicable because it was decided after the defendant's conviction and appeal. Miller-El cites no case that grants *Swain* relief in which *Batson* was also applied to the prosecutor's use of peremptory challenges. Therefore, the Magistrate Judge's recommendation on the *Swain* claim is accepted in whole.

B. Batson claim

The principal legal objection to the Magistrate Judge's recommendation on the *Batson* claim is that the Magistrate should have placed more weight on the strong evidence of discrimination in jury selection by Dallas County District Attorneys at the time of Petitioner's trial. Petitioner cites the plurality in *Hernandez v. New York*, 500 U.S. 352 (1991) for the proposition that the trial judge must take all evidence into account in the third step of the Batson inquiry—whether the Defendant has proved purposeful discrimination. However, *Hernandez* also stands for the deference of a federal habeas court to the credibility determination of the state trial judge in determining discriminatory intent. *See Hernandez v. New York*, 500 U.S. 352, 365 (1991). The Magistrate Judge properly deferred to the experience of the trial court judge in

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[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[2] *Swain v. Alabama*, 380 U.S. 202 (1965).

evaluating the demeanor of each juror and the prosecutor in determining purposeful discrimination.

Petitioner's objections to the Magistrate's factual findings are overruled. The Magistrate Judge did not "discount the massive evidence" in support of the first step of the *Batson* inquiry—the prima facie case that the prosecutor excluded jurors solely on the basis of their race. Rather, the Magistrate noted that an inference of purposeful discrimination had already been found by the Court of Criminal Appeals, and determined that further discussion of the evidence in support of the prima facie case was unnecessary.

III. COMPETENCY CLAIMS

Miller-El's first objection is that the Magistrate Judge failed to conduct a *de novo* review of his *Pate*[3] and *Dusky*[4] claims. Miller-El cites no authority for the proposition that a state trial court's adoption of one party's proposed factual findings and legal conclusions corrupts the judicial process so that his claim is not "adjudicated on the merits" under 28 U.S.C. § 2254(d). Equally, there is no authority that the Fifth Circuit has adopted the pre-AEDPA *Townsend*[5] exceptions to the presumption of correctness in 28 U.S.C. § 2254(d) and 28 U.S.C. § 2254(e)(1).

Miller-El's second objection is that the Magistrate Judge did not expressly address his *Pate* claim. This Court holds that the Magistrate's factual findings show that the *Pate* claim is not meritorious. Objectively considered, the information received by the trial court regarding Miller-El's condition would not have alerted him to the possibility that Petitioner could not rationally aid his attorney in his defense. Both the Petitioner and his attorney, as well as the trial judge, state

[3] *Pate v. Robinson*, 383 U.S. 375 (1966).

[4] *Dusky v. United States*, 362 U.S. 402 (1960).

[5] *Townsend v. Sain*, 372 U.S. 293 (1963).

on the record that Miller-El was competent and aware of the proceedings. The Court finds that Petitioner has not established a *Pate* claim.

Finally, the Court overrules Petitioner's objections to the Magistrate Judge's factual findings, as they are supported by the record in this case.

IV. CHALLENGE FOR CAUSE

The Magistrate Judge held that juror Joyce Willard was not improperly excluded from the jury panel in violation of *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Petition's objections point to no demonstrable error of law or fact. Therefore, the Court adopts the Magistrate Judge's findings and recommendation as to Petitioner's fifth ground for relief.

V. IMPROPER MENTION OF RELIGIOUS AFFILIATION

Petitioner claims that references to his membership in the Moorish Science Temple a the guilt-innocence and sentencing phase of this trial were in violation of *Dawson v. Delaware*, 503 U.S. 159, 165 (1992). While there is no "per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment," the government may only use such evidence when it is sufficiently related to the issues involved. *Dawson v. Delaware*, 503 U.S. 159, 165 (1992).

Petitioner objects that the Magistrate Judge did not explain the significance of the few references to Petitioner's religious affiliation at the punishment stage. The Court finds that, as evidence had been submitted at trial that other members of the Moorish Science Temple were armed and involved in crime, the references to Miller-El's membership in this group were related to the issue of future dangerousness. *See, e.g., Fuller v. Johnson*, 114 F.3d 491, 498 (5th Cir. 1997), *cert denied*, 522 U.S. 963 (1997).

VI. CONCLUSION

Subject to the modifications above, the Court **ADOPTS** the Magistrate Judge's Findings and Recommendations. Miller-El's Petition for Writ of Habeas Corpus is hereby **DENIED**.

SO ORDERED

DATED: June 5, 2000

BAREFOOT SANDERS
Senior U.S. District Court Judge
Northern District of Texas

IN TH. NITED STATES COURT OF APPI
FOR THE FIFTH CIRCUIT

No. 00-10784

U.S. COURT OF APPEALS
FILED
SEP 12 2001
CHARLES R. FULBRUGE III
CLERK

THOMAS JOE MILLER-EL

Petitioner - Appellant

v.

GARY L JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

Respondent - Appellee

Appeal from the United States District Court for the Northern District of Texas, Dallas

---

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 8/7/01, 5 Cir., _____, _____ F.3d _____)

Before JONES, DeMOSS, and PARKER, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

JURY SELECTION IN A CRIMINAL CASE

It is often said that most cases are won or lost on Voir Dire -- I agree. It is the first opportunity you have to impress the panel with your sincerity, integrity and ability. I believe in the importance of first impressions; if you can show the panel that you wear the "white hat," and if you don't destroy that illusion during the trial, then the jury will want to convict. Who you select for the jury is, at best, a calculated risk. Instincts about veniremen may be developed by experience, but even the young prosecutor may improve the odds by the use of certain guidelines -- if you know what to look for.

First and foremost, you are dealing with people, and there are no hard and fast rules governing who will be a good State's juror. Who you select, and what you qualify the panel on will depend on the type of crime, the age, color and sex of the Defendant, the rules of the Court, the personality of the defense attorney, and your own individual style and judgement.

The following outline contains very little substantive law because I presume that any prosecutor is as able to look it up as I. The outline does, however, contain one prosecutor's ideas on some things that need to be said to the panel, and some things to look for in a juror.

DEFENDANT'S EXHIBIT 1 Pre-trial 3-13-86

I. Purpose Voir Dire.

- A. Legal purpose.
  - 1. To qualify jurors on law regarding case.
  - 2. To become acquainted with veniremen so that you may use your strikes intelligently.
- B. Tactical Purpose.
  - 1. Allow the veniremen to be impressed with you and your cause.
  - 2. Explain the law in the manner most beneficial to the State.

II. Preparation for Voir Dire. In many counties, the prosecutor selecting the jury will not present the evidence.

- A. Look up and learn the law regarding the particular offense to be tried.
  - 1. List and remember the elements of the offense.
  - 2. Understand and remember any definitions of words of art applicable to the offense.
- B. Be well acquainted with facts of your case.
  - 1. Learn what general law will be applicable to the facts.
  - 2. Learn all weaknesses in the case in order to prepare the jury.
- C. If you do not know the judge well, discuss Voir Dire with him in advance.

1. It will allow you to know where you stand on questionable issues so that you will not be embarrassed in front of the panel by an adverse ruling.
2. If the judge usually conducts Voir Dire himself, he may allow the lawyers to do it if asked -- this is always preferable.

III. What to look for in a juror.

A. Attitudes.

1. You are looking for a strong, stable, individual who believes that Defendants are different from them in kind, rather than degree.
2. You are not looking for any member of a minority group which may subject him to oppression -- they almost always empathize with the accused.
3. You are not looking for the free thinkers and flower children.

B. Observation is worthwhile.

1. Look at the panel out in the hall before they are seated. You can often spot the show-offs and the liberals by how and to whom they are talking.
2. Observe the veniremen as they walk into the courtroom.

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a. You can tell almost as much about a man by how he walks, as how he talks.
b. Look for physical afflictions. These people usually sympathize with the accused.

3. Dress.

a. Conservatively, well dressed people are generally stable and good for the State.
b. In many counties, the jury summons states that the appropriate dress is coat and tie. One who does not wear a coat and tie is often a non-conformist and therefore a bad State's juror.

4. Women.

a. I don't like women jurors because I can't trust them.
b. They do, however, make the best jurors in cases involving crimes against children.
c. It is possible that their "women's intuition" can help you if you can't win your case with the facts.
d. Young women too often sympathize with the Defendant; old women wearing too much make-up are usually unstable, and therefore are bad State's jurors.

e. It is impossible to keep women off your jury, but try to keep the ratio at least seven to five in favor of men.

5. Weight. Extremely overweight people, especially women and young men, indicates a lack of self-discipline and often times instability. I like the lean and hungry look.

6. Age. People over forty are more settled and more ready to believe that criminals should be punished.

7. Race. Minority races almost always empathize with the Defendant.

8. Demeanor.

a. Attentive, intelligent looking veniremen that you are able to communicate with on Voir Dire will generally be all right.

b. Always observe how the veniremen react when being questioned by the defense attorney, and compare it to the veniremen's reaction to you.

IV. Your approach to the jury panel.

A. When the judge is talking to the panel.

1. Sit at the counsel table with your chair turned at an angle so that you can see the judge and the panel; ie, never turn your back to the panel.

2. Sit upright and have some eye contact with the panel.

B. When you are talking to the jury panel.

1. Stand upright and be as loose and at ease as possible.

2. Stand close to the panel. The further you are away, the more distant seems the communication.

3. Don't pace, but some movement may aid in keeping their attention.

4. Use your notes as little as possible.

5. Smile, be pleasant, but not too jovial; impress them with your earnestness.

V. Speaking to the entire panel.

A. Introductory.

1. Introduce yourself, tell your position, who you work for and who you represent.

2. Introduce the Defendant and his attorney(s), asking if anyone knows them either personally or by reputation. Don't dignify the Defendant by calling him "Mister", or using his first name.

3. Orient the panel (if the judge does not) as to what Court they are in, the jurisdiction of the Court (as to felony vs. misdmeanor), explain the difference and explain that your purpose is to find twelve fair and impartial people to serve on this jury -- people that

can be just as fair to the State as you know they will be to the Defendant.

a. This approach makes it appear that the State is the underdog -- most people will pull for the underdog.

b. Reasons for briefly orienting the panel.

(1) Most veniremen are ignorant of any specifics regarding the Courts and the legal procedures.

(2) It gives the panel the feeling that you are trying to aid them.

4. Explain their duties as jurors.

a. They are not expected to know the law and, the judge will give them all the law of the case in the Court's charge.

b. The jury is to determine the facts of the case, the credibility of the witnesses, and the weight to be given their testimony.

(1) The jury may believe all, any part of, or nothing that any witness says.

(2) They may look to the witness': demeanor, motive or bias, reasonableness of what is said -- using their common sense to guide them.

c. If you know that the Defendant has more witnesses than you, explain that numbers are not decisive, and they may disbelieve one hundred witnesses in favor of the testimony

of one.

B. Qualifying the panel on the general law. This is the law applicable to every criminal case.

1. Presumption of innocense.

Tell the jury:

a. All Defendants in a criminal case, no matter what they are charged with, are presumed to be innocent.

b. It is a legal presumption and just because they are presumed to be innocent does not mean that he (the Defendant) did not commit the crime.

c. This presumption lasts only until the State removes it by proving its case to their satisfaction beyond a reasonable doubt.

2. Burden of proof -- beyond a reasonable doubt. Explain that:

a. The State understands that burden and willingly accepts it, or else would not be here.

b. Though we accept our burden, we wish to be held to no higher burden, such as; beyond any doubt, or beyond a shadow of a doubt.

c. A mere discrepancy in evidence is not reasonable doubt.

d. The doubt must be reasonable, and it must be a reasonable doubt applicable to one of the elements of the offense that the law requires the State to prove to entitle it to a conviction.

3. Defendant's failure to testify.

Explain that:

a. The Defendant may call witnesses in his own behalf if he chooses, and may subpoena any witness that could help him.

b. The Defendant may testify in his own behalf if he chooses, but if he should decide not to testify, we who represent the people can not call him as a witness, and they, the jury, could not consider his failure to testify as any evidence.

c. If he should so choose to testify, they must consider his credibility; looking to his demeanor, the reasonableness of his testimony, and his motives for lying -- what he has to gain or lose.

d. Just because he is presumed to be innocent, does not mean that he is presumed to be a truth teller.

C. Qualifying the panel of the law of your case.

1. Carefully explain the elements of the offense as listed in the indictment and advise the

panel that the State must prove these things, but none other.

2. Define any words of art that are necessary to your case and distinguish the legal meaning from the usual meaning, such as:

a. "Intoxication" is not necessarily drunk.

b. "Malice" is not premeditation.

c. "Possession" is not ownership.

d. "On or about" means accessable.

e. "Assault" does not require a touching.

f. "Carnal knowledge" requires only penetration.

3. Give examples when you explain the law. The examples should be of a crime less aggravated than the one you intend to prove, so when you present your facts the jury will think it is a highly aggravated crime.

4. Qualify the panel on defensive issues.

a. The defense attorney will do this anyway, so you tell them first and in the light most beneficial to the State.

b. Circumstantial evidence.

(1) Explain that it is a type of evidence, and is different only in kind to direct evidence. Tell them that fingerprints are circumstantial evidence.

(2) Give examples of circumstantial evid-

5. Punishment.

a. This is the most important qualifying issue.

(1) In many cases the only issue is that of punishment. A case is never won unless a jury returns more time than you offer on a plea of guilty.

(2) A person weak on the maximum punishment will generally be weak on guilt.

b. Tell the jury that the State intends to ask the jury a sentence for "life" (or a substantial number of years, etc.) at the close of the testimony.

(1) This can backfire unless you have evaluated the case and know that you can ask "life" (etc.) without looking ridiculous.

(2) This is a good approach because it gives the jury time to get used to the idea of a high verdict.

(3) It allows you to argue on punishment that you have been fair with them (the jury) from the outset by telling them what you would be seeking.

c. Always stress the maximum in the range of punishment, but advise and qualify the panel on the minimum -- otherwise, you may lose your aura of extreme fairness.

d. Probation.

(1) Ask the judge to require the application for probation to be filed before jury selection so you may qualify the jury.

(2) Explain the probation law to the panel, and that just because a person may be eligible for probation, does not mean that he is entitled to probation.

(3) On heavy cases such as murder, rape and robbery, etc:

(aa) Explain that every Defendant, no matter what he is charged with falls within the probation law.

(bb) The minimum punishment, especially probation, is fertile ground for the defense disqualifying a juror for cause. Since you talk to the panel first, you can prevent the disqualification of a strong juror.

(11) Explain that they don't have to be able to think of a murder case where the Defendant may deserve probation, but if one should come along, and they thought it was the right thing to do, they could vote it.

(22) Couch the question in terms of what a "fair" person would do (no one considers themselves unfair.)

(4) Always tell the jury that the State is opposed to probation in this case.

e. Tell the panel about a bifurcated trial and that on punishment they may consider all of the evidence introduced on the guilt or innocence phase of the trial, and also the reputation, character and prior criminal record, if any, evidence of which may be admitted on the punishment hearing.

(1) The above is a true statement of the law, and any judge should allow a prosecutor to so advise the jury.

(2) Stress the words, "and prior criminal record", because it will dispell the jury's beliefs that a Defendant's record will be admitted on the guilt or innocence hearing.

f. Talk in terms of a "sentence" of life, etc., stressing the word "sentence". This will convey to the panel the fact that he will be paroled early.

g. The State has no burden of proof on punishment as it does on guilt. We need not prove beyond a reasonable doubt that the Defendant deserves any particular sentence -- it is the jury's job to make the punishment fit the crime.

VI. Questioning the veniremen individually -- this is done after addressing the panel as a whole.

A. Demeanor, preliminaries and helpful hints.

1. The questioning will progress much more smoothly if you can persuade the Court to seat the veniremen in the order that they are listed.

2. Be pleasant and respectful. Use "Yes, sir" or "Yes, Ma'am", and never talk down to a venireman.

3. Remember that the veniremen are probably self-concious; the more at ease you are with them the more they will be at ease and honest with you.

4. Never give any indication to the panel as to whom you will strike.
5. Look at the venireman's eyes and throat during your questioning (especially relating to punishment).
6. Rate your venireman from one to five in the order of his desirability.
   a. This will allow you to concentrate on the individual and his answers rather than writing.
   b. If you want a record of their answers, have someone else in Court take notes.
7. In striking your lists, be careful; more than one prosecutor has left an undesirable venireman on the jury as a result of striking the wrong name.

B. Questioning the veniremen individually.
1. Ask the length of residence in the county.
   a. People that move around very much are often unstable.
   b. If the veniremen have not lived in the county long, ask where they were born and reared.
      (1) People from small towns and rural areas generally make good State's jurors.
      (2) People from the east or west coasts often make bad jurors.

2. Who their family consists of.
   a. People with a family are generally more responsible and therefore better jurors.
   b If the venireman has children, ask their ages if the case is one involving a crime against children, or the Defendant is young.
3. Occupation.
   a. Ask a man "What is your profession or occupation?". Ask a woman "Are you employed outside the home?".
   b. Working men.
      (1) If a man is unemployed it may indicate instability.
      (2) Men who are self-made successes, or work with their hands, or work in a managerial capacity are usually good.
      (3) Technical jobs (engineers, accountants and scientists). There are two theories:
         (a) They will pick your case apart, therefore, they are bad.
         (b) They are not inclined to "chase rabbits" thrown out by defense attorneys, therefore they are good.
      (4) Intellectuals such as teachers, etc. generally are too liberal and con-

templative to make good State's jurors.

c. Working women.

(1) These women are often preferable to other women because they have had a glimpse of the cruel, hard world.

(2) Women working in retail sales often make good State's jurors.

d. Spouse's occupation is a good question because all people to a varying extent, are reflections of their spouse.

4. Ask if the venireman has any hobbies or interests that occupy their spare time.

a. Active, outdoors type hobbies indicate the best State's jurors.

b. Hunters always make good State's jurors.

5. Ask men if they have ever served in the military; if so, when, what branch of the service, their rank upon discharge and if they saw combat. Marines, master sargeants and those that have seen combat generally make good State's jurors.

6. Ask veniremen their religious preference.

a. Jewish veniremen generally make poor State's jurors. Jews have a history of oppression and generally empathize with the accused.

b. Lutherans and Church of Christ veniremen usually make good State's jurors.

c. Those that indicate that they have no religious preference are often non-conformists and bad State's jurors.

7. Ask veniremen if they have ever had a direct interest in the outcome of a criminal case.

a. This is an interest in the sense that they, or a member of their family, or close personal friend has been charged with a crime.

b. If someone volunteers, take him before the bench to illict further questions, rather than embarrass the venireman in front of the entire panel.

c. Obviously, you don't want anyone who had a close friend or relative that was prosecuted by the State.

8. Ask the veniremen if they have previously served on a criminal jury.

a. Experienced jurors usually are better for the State than the inexperienced jurors.

b. You may ask the veniremen anything about the prior case other than the verdict.

In the County of Dalla. §
§
§
State of Texas §

Affidavit of Jennifer Balido

My name is Jennifer Balido, I am a resident of Dallas County, Texas, and I am over 18 years of age and competent to give this affidavit. Having been duly sworn, I hereby state the following:

1. I was employed in the Criminal District Attorney's Office in Dallas County from October 1992 to October 1996. During my tenure in the District Attorney's Office, I represented the State of Texas in *Ex parte Joe Thomas Miller-El*, No. 31, 001-01 (Tex. Crim. App. 1996) (*per curiam*) (unpublished) in both the Court of Criminal Appeals and the trial court. *See Ex parte Miller-El*, W85-78668-L(A) (Dist. Ct. of Dallas County, 5th Criminal District Court, April 16, 1996).

2. After Applicant Miller-El filed his reply to my answer to his supplemental petition, I prepared findings of fact and conclusions of law for Judge McDowell to sign, recommending to the Court of Criminal Appeals that Mr. Miller-El be denied relief. I submitted my findings of fact and conclusions of law to Judge McDowell and his briefing attorney, Kerry Young, but I did not file them in the Dallas County District Clerk's Office or serve a copy on counsel for Miller-El, Ms. Ruth Kollman. As far as I know, Ms. Kollman was unaware I had submitted the findings and conclusions. I gave Judge McDowell the findings of fact and conclusions of law sometime after Ms. Kollman filed "Petitioner's Reply to Respondent's Answer to Petitioner's Supplemental

Petition" on March 2., .996, but I do not know on what specific date I gave those findings of fact and conclusions of law to Judge McDowell. Judge McDowell told me that he would look over the findings and conclusions and have Kerry Young look over them as well.

3. In the Criminal District Attorney's Office in Dallas County, it was routine practice and policy for our office to prepare findings of fact and conclusions of law in habeas corpus cases, and submit them to the trial court without filing them in the Dallas County District Clerk's Office or providing a copy to counsel for the applicant. It was also routine practice that if the Presiding Judge or his briefing attorney had any additions or changes that needed to be made, they would notify me and I would make those additions or changes for them. I do not specifically recall if Judge McDowell or Kerry Young made any changes or additions to the findings of fact or conclusions of law as I originally submitted to them.

4. The only materials I provided for review by Dr. Steven P. Bowers in preparation of his affidavit filed in the state habeas cases are the materials outlined in his affidavit. I do not know of any other materials that he may have reviewed.

I have read the above statement and swear, under the pain and penalty of perjury, that it is true and correct to the best of my knowledge. I give this statement of my own free will.

Jennifer Balido
Jennifer Balido

SUBSCRIBED AND SWORN to before me at Dallas, Texas this 3rd day of March, 1997.

Lena S Francis
Notary Public
my commission expires
04/14/98

This Appendix contains a photocopy of a newspaper article. A copy of the same newspaper article, printed from Westlaw, is reproduced in Appendix 11. The Westlaw copy is more legible, but does not include the photographs, charts and/or graphs that are in the photocopy.

The Dallas Morning News

Texas' Leading Newspaper — Dallas, Texas, Sunday, March 9, 1986 — 25 Sections — 75 Cents

Race bias pervades jury selection

Prosecutors routinely bar blacks, study finds

First in a series

By Steve McGonigle and Ed Timms

Staff Writers of The News

Dallas County prosecutors routinely have excluded almost nine out of 10 blacks qualified to serve as jurors, perpetuating a decades-old pattern of racial discrimination in jury selection.

Four out of five black defendants in the nation's most populous county who have gone to trial since the new method of selecting juries was put into effect in March 1985 have been tried by juries with no blacks on them.

An eight-month investigation by The Dallas Morning News has found that the constitutionally guaranteed impartial jury of their peers will be all white.

JURIES WITHOUT PEERS

Dallas County

- Prospective jurors polled: 394
- What lawyers look for: 394

The Dallas Morning News shows that prosecutors routinely manipulate the racial composition of juries through their use of peremptory challenges — legal objections that allow lawyers to dismiss prospective jurors without explanation.

District Attorney Henry Wade, however, denied that his assistants exclude prospective jurors solely because of race. Prosecutors act within the adversary legal system, Wade said, striking those people who might jeopardize "a fair trial" for their client — the people of Dallas County.

Although blacks comprise 18 percent of Dallas County's population, The News' analysis of 100 randomly selected felony trials found that less than 4 percent of jurors were black. In fact, the chances of a qualified black serving on a jury was 1-in-10, compared to a 1-in-3 chance for a qualified white.

Of those blacks struck from juries by peremptory challenges, the study found, 91 percent were barred by prosecutors. Blacks were excluded from juries at almost five times the rate of Anglo jury candidates and twice as often as Hispanic candidates.

Several legal experts characterized the findings as showing that Dallas County prosecutors are engaging in a "systematic exclusion" of black jury candidates that violates not only the defendants' right to a fair trial, but also the right of black citizens to participate equally in administering justice.

Defense attorneys contend that prosecutors, while picking what they perceive will be the most conviction-prone juries, are ignoring

Please see RACE on Page 36A.

HOW DALLAS COUNTY JURIES BECOME VIRTUALLY ALL-WHITE

Number of eligible black potential jurors called for 100 jury trials	487
Number of blacks struck by prosecutors using peremptory challenges*	405
16 Number of blacks struck by defense attorneys using peremptory challenges	
48 Number of blacks selected for juries out of 4,434 prospective jurors summoned	

* 91 of the number struck. Blacks struck... whose reasons included... [illegible]

SOURCE: Based on a three-month study of 100 consecutive felony trials in which... The 100 trials were chosen randomly.

The Dallas Morning News

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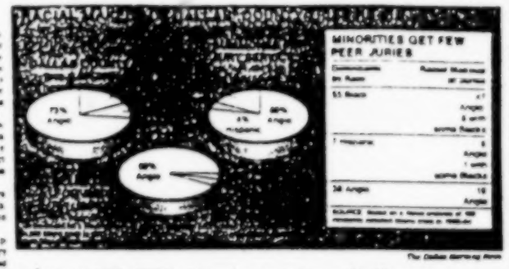
Race bias p[illegible]vades jury selection, study finds



The Dallas Morning News

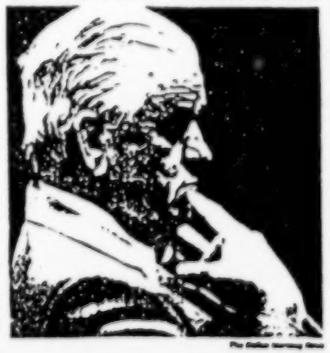
[illegible]

"I don't see that there is a good reason, and I don't think there's ever been a good reason, to systematically exclude blacks."

— Jon Sparling, former prosecutor

"I'm in shock. I thought things had gotten a lot better, but apparently they haven't."

— Larry Baraka, state district judge



The Dallas Morning News

Picking juries is an inexact science, [illegible]wyers say

By Ed Timms and Steve McGonigle

[illegible]

"It's not unusual for a prosecutor to [illegible] leave a black or Hispanic on, especially if they are not well-educated and therefore pose no threat, because they are perceived as being the type of people who will go along with the crowd."

— Ruben Bonilla, Corpus Christi lawyer

[illegible]

Prosecutors routinely exclude blacks from juries

Continued from Page 28A.

[illegible]

The Dallas Morning News

Robbery charges against Lowell Geier were dropped in 1984 after he served 10 months in prison. Prosecutors had dismissed all of the black prospective jurors before his trial.

[illegible]

Most blacks trust selection system, survey finds

By Steve McGonigle and Ed Timms

[illegible]

Robert Gordon: "It's hard to think that blacks empathize with a black defendant."

[illegible]

JURIES WITHOUT PEERS

Race bias pervades selection of juries

Continued from Page 29A.

ard Mays.

Judges Kinkeade and Baraka, however, said judges can prevent systematic exclusion by informally telling prosecutors that they will not tolerate such behavior.

Last year, for example, Baraka said that he barred one prosecutor from selecting juries in his court when the lawyer did not give an adequate reason for excluding all black members of a jury panel.

In more than a dozen trials in Dallas and elsewhere in the state, *The News* observed only one defense lawyer complain about jury selection being racially biased. The lawyer, John Stauffer of Dallas, complained that prosecutors denied his client a jury of her peers by dismissing all eligible blacks during the jury selection.

"This is not due process, it is not constitutional, it is against God," Stauffer said after the trial.

No lawyer representing a black defendant questioned potential jurors about possible race bias before a jury was selected.

Defense lawyers in the trials said they did not raise the race issue because they did not want to anger the jury panel and because they said they did not believe even the most racist person would admit to being bigoted.

But other lawyers said they consider it critical to ask prospective jurors whether the defendant's race will affect their ability to be fair. Some lawyers say that merely raising the issue can defuse racist tendencies in jurors.

"If you have a black defendant and a white complaining witness and you don't ask about racial prejudice, you ought to have your bar card jerked that very day," said defense lawyer Richard Corbitt. "I think it's malpractice."

Still other defense lawyers say that while they do not approve of the way prosecutors exclude minorities with peremptory challenges, they do not want to risk losing their ability to dismiss whomever they choose.

Judge Baraka said racially discriminatory jury selection is not strictly a legal issue. "Morally, it's wrong because black people are people, and they pay these people's salaries with their tax dollars.

"They (prosecutors) are supposed to be protecting the interests of all citizens. And how can they protect their interests if you won't take them into the system?"

Defense lawyer Henry Ackels noted that laws can change.

"It wasn't until 1963, 175 years after the Constitution was adopted, that the courts said everybody has a right to have a lawyer . . . It wasn't until Brown vs. Board of Education that the courts decided everybody had a right to an equal education," Ackels said.

"Sometimes, it takes 200 years before we start waking up to a constitutional right that we've had all the time."

This Appendix contains the text of a newspaper article, printed from Westlaw. A photocopy of the same newspaper article is reproduced in Appendix 10. The photocopy is less legible, but includes photographs, charts and/or graphs which are not included in this Appendix.

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Sunday, March 9, 1986

NEWS

RACE BIAS PERVADES JURY SELECTION Prosecutors routinely bar blacks, study finds Series: DISCRIMINATION IN JURIES

Steve McGonigle, Ed Timms
1986, The Dallas Morning News

Dallas County prosecutors routinely have excluded nine out of 10 blacks qualified to serve as jurors, perpetuating a decades-old pattern of racial discrimination on felony juries.

For four out of five black defendants, the selection process means that the constitutionally guaranteed impartial jury of their peers will be an all-white jury.

An eight-month investigation by The Dallas Morning News shows that prosecutors routinely manipulate the racial composition of juries through their use of peremptory challenges -- legal objections that allow lawyers to dismiss prospective jurors without explanation.

District Attorney Henry Wade, however, denied that his assistants exclude prospective jurors solely because of race, although he acknowledged that race may be a factor in whom they dismiss. Prosecutors, Wade said, act within the spirit of the adversary legal system to exclude anyone if they believe it will give their client -- the people of Dallas County -- "a fair trial.'

While blacks comprise 18 percent of Dallas County's population, The News' analysis of 100 randomly selected felony trials found that fewer than 4 percent of jurors were black. In fact, the chance of a qualified black serving on a jury was 1-in-10, compared to a 1-in-2 chance for a qualified white.

Of those blacks struck from juries by peremptory challenges, the study found, 92 percent were barred by prosecutors. Blacks were excluded from juries at almost five times the rate of Anglo jury candidates and twice as often as Hispanic candidates.

Several legal experts characterized the findings as showing that Dallas County prosecutors are engaging in a "systematic exclusion' of

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black jury candidates that violates not only the defendants' right to a fair trial, but also the right of black citizens to participate equally in administering justice.

Defense attorneys contend prosecutors, while picking what they perceive will be the most conviction-prone juries, are ignoring their legal duty to uphold justice.

"I think that the black population, being a significant portion of Dallas County, is being totally discriminated against, and if I were a black person I'd be up in arms about it,' said Dallas defense lawyer Kerry FitzGerald, head of the Texas Criminal Defense Lawyers Project.

Wade, Dallas County's chief prosecutor for 35 years, said that in some cases, he believes blacks may be "more likely' to convict defendants than those who actually are selected for juries.

"I'm frankly trying to get more on (juries),' Wade said of blacks. "We don't take them on just to balance the jury.'

City Council member Al Lipscomb, an outspoken critic of jury selection in Dallas County, charged that prosecutors are using "racist tactics' that alienate blacks from the judicial system.

"The criminal justice system itself should be indicted here in Dallas for tampering with the law, for tampering with the rights of citizens,' said Lipscomb, one of two black members on the City Council.

The U.S. Supreme Court has ruled that systematic exclusion of an identifiable group of potential jurors is unconstitutional. It has reversed criminal convictions on such grounds -- including three cases from Dallas County in the 1940s in which racial bias in the selection of grand jurors was alleged.

FitzGerald contended that "stacking' the racial makeup of juries denies defendants of all races their constitutional right to have their fates determined by a representative cross section of the community.

Increasingly, similar arguments are being voiced throughout the nation. Supreme courts in four states and three of the 11 federal circuit courts of appeal, for example, have modified peremptory challenges because of concern about their racially biased use by prosecutors.

In Texas, prosecutors and defense lawyers each have 10 peremptory challenges in non-capital felony trials. The peremptory challenge

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allows lawyers to cull prospective jurors without having to give cause.

The U.S. Supreme Court is studying the "cross section argument' -- that defendants have a right to a trial by a representative section of the community -- in a Kentucky case to decide whether to modify a controversial 1965 decision that permits racially based peremptory challenges in individual cases.

The court stated in Swain v. Alabama that a prosecutor's use of his peremptory challenges is not unconstitutional unless he uses them "in case after case' to exclude blacks for no reason related to any trial strategy.

Critics of Swain contend that it gives prosecutors free rein to exclude blacks and imposes an impossible burden on defendants to prove unconstitutional exclusion because of the lack of records identifying potential jurors by race.

Arch McColl, president of the Dallas County Criminal Bar Association, said The News' study exemplifies the type of race discrimination by state action that the high court consistently has condemned. It also demonstrates, McColl said, that prosecutors still adhere to jury selection guidelines suggested in a controversial 1969 paper.

The paper, written by then-Assistant District Attorney Jon Sparling, noted that minorities "almost always empathize with the accused' and therefore do not make good jurors for the prosecution.

"You are not looking for a fair juror,' Sparling advised in the paper, which later was made part of a manual for Texas prosecutors, "but rather a strong, biased and sometimes hypocritical individual who believes that defendants are different from them in kind rather than degree.'

Sparling, now a candidate for the Republican nomination for district attorney, said he was repeating "the conventional wisdom of the time' and that he no longer believes the guidelines are valid.

"I don't see that there is a good reason, and I don't think there's ever been a good reason, to systematically exclude blacks,' Sparling said.

State District Judge Larry Baraka, a former prosecutor and the county's first black felony court judge, said The News' findings also demonstrate the failure of judges and defense lawyers to stop the exclusion of qualified blacks from jury service.

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"I'm in shock,' Baraka said. "I thought things had gotten a lot better, but apparently they haven't.'

Wade said his assistants are trained to use their peremptory challenges to dismiss potential jurors they believe will empathize with the defendant. He said, however, that not all his assistants may use their peremptory challenges intelligently.

"You're trying to get either a completely unbiased juror or one that may be biased in favor of the state,' said Wade, who is not seeking re-election. "And I suspect a lot of those (blacks) being cut would probably be better jurors than the ones they end up with.'

Wade suggested that the high rate of black exclusion revealed in The News' study might stem from a disproportionately large number of blacks who express doubt about assessing maximum punishments or who have personal knowledge of criminal cases.

Wade said he was not convinced by The News' findings that his assistants engage in an illegal, systematic exclusion of blacks. "It indicates, maybe, that,' he said.

The News' study is based on a computer analysis of Dallas County court records from 100 felony jury trials conducted during 1983 and 1984. The trials were selected at random from among the 1,036 trials held during that period.

The study examined records on 4,434 prospective jurors to determine the racial composition of juries, as well as the race of persons excluded from jury service by judges, prosecutors and defense lawyers.

Among the major findings of the study are:

*Juries in 72 of the 100 trials had no blacks. Of the 28 juries with black members, eight sat in judgment of black defendants while 20 decided the fate of Anglo and Hispanic defendants.

*Only two of 54 black male defendants included in the study were tried by juries that had black males. None of the seven male Hispanic defendants had a male Hispanic juror. All 38 Anglo defendants had a majority of Anglos on their juries.

*Of those blacks eliminated from jury service by peremptory challenges, 92 percent were struck by prosecutors. Four percent were excluded by defense lawyers, and 4 percent were dismissed by both sides. (Neither side knows the other's challenges until the judge receives them at the end of the preliminary examination.)

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*Forty-seven Hispanics and 46 blacks served on juries, although the number of blacks summoned for jury duty was five times greater than the number of Hispanics.

*The percentage of blacks disqualified from jury service by judges was 1 1/2 times the percentage of disqualified Anglo or Hispanic jury candidates. However, blacks were excluded by prosecutors at almost five times the rate of Anglo jury candidates and twice as often as Hispanic candidates.

Prosecutors maintain that blacks themselves are partly responsible for their underrepresentation on felony juries because many disqualify themselves by saying they cannot judge others or consider a life sentence in cases where state law provides such punishment upon conviction.

Under Texas law, prospective jurors who say they cannot follow the law because of personal convictions or bias are disqualified for "cause.'

After those disqualified are dismissed by the judge and both sides exercise their peremptory challenges, the first 12 people who remain are chosen to sit on the jury.

Peremptory challenges, in varying forms, have existed since the 13th century in English law. Historically, they were granted only to the defense in a criminal case. It has been in the last century in the United States that prosecutors were granted the right to exercise such challenges.

Defense lawyers argue that the use of peremptory challenges by Dallas County prosecutors to exclude blacks from juries stems from a racial stereotype that blacks are less inclined to convict and assess harsh penalties.

The stereotype has been passed from generation to generation of prosecutors and is particularly acute in Wade's office, defense lawyers say, because of its heavy emphasis on conviction rates as the means for earning promotion.

"You don't get hired unless you can play that game, and you certainly don't progress,' said Vincent Perini, president of the Dallas Bar Association.

"What they are, really, is a bunch of SMU frat rats who are, you know, putting in a little postgraduate work down there kicking nigger ass before going on to the real world, the respectable world, the Dallas Country Club and the civil law firm,' Perini said.

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Norman Kinne, one of Wade's top three felony prosecutors and a member of his staff for 14 years, strongly denied Perini's characterization of the district attorney's staff.

"I can't believe the elected president of the Dallas Bar Association, in one fell swoop, manages to insult Southern Methodist University, fraternities, the black race, the Dallas Country Club and all civil law firms,' Kinne said.

"However, we have tried over the years to provide, under Mr. Wade's guidance, professional prosecution of which all citizens may be proud. The record of this office and the quality of life in Dallas speaks for itself.'

Baraka said stereotyping blacks as being less inclined to convict and assess tough sentences is "absurd.'

"Skin color has nothing to do with the process of your damn brain,' he said.

Defense lawyers say the practice of excluding blacks has diminished as the number of black prosecutors in Wade's office has increased, but they say that even black prosecutors succumb to the pressure to win at all costs. Eight of the 42 felony court prosecutors on Wade's staff are black.

Black lawyers, in particular, maintain that blacks, more than whites, have more reason to dislike criminals because of the higher crime rate in the black community.

"People, be they black, white or brown, are tired of crime; they're just tired of it,' said Royce West, a black former prosecutor and a Democratic candidate for district attorney. "I think that when blacks and browns are systematically included on juries that they will give stiffer punishments.'

Added defense lawyer Frank Hernandez: "Blacks, Mexican-Americans, women are just as tough, if not tougher, on a defendant who meets their minority status because they look upon that person with some sort of anger sometimes: "You are causing our whole group to be looked upon in this (bad) way.'

"Just because you're black doesn't mean that if the defendant is black he gets away,' said Hernandez. "Blacks don't like to be shot at in 7-Elevens any more than anybody else. Nor do Hispanics like to be burglarized.'

The practice of prosecutors excluding blacks is so commonplace that defense lawyers say they routinely incorporate it into their

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trial strategy, rarely dismissing even prosecution-minded blacks, anticipating that prosecutors will use one of their peremptory challenges to do the job for them.

In The News' study, only 3.3 percent of the peremptory challenges exercised by defense lawyers were against blacks; 2.5 percent were against Hispanics. Ninety-four percent of the defense strikes were exercised against Anglos.

Dallas County Public Defender Ralph Taite said he routinely warns black clients that they will likely face "a white jury composed of housewives, sometimes rednecks, a lot of middle-class people who come from the suburbs, who have very little contact with them.'

"There's not going to be anybody on that panel who's going to be able to say, "Yeah, that's the way it is over in South Oak Cliff, or South Dallas, or West Dallas,' ' Taite said.

The only time blacks get on a jury, defense lawyers contend, is when there are too many white non-conformists who appear to prosecutors to be even worse risks.

"You get about 12 hippies and 14 painted-up women and a bunch of cab drivers and bartenders, and they (prosecutors) will be inclined to take chamber of commerce-type blacks -- you know, business-looking, good background with job,' said veteran defense lawyer Charles Tessmer.

Defense attorney Richard Aguire said The News' findings that Hispanics serve on juries in a greater proportion than blacks confirms observations that prosecutors prefer Hispanics over black jurors.

The reason, Aguire said, is that prosecutors believe Hispanics will follow the lead of the Anglo majority on a jury. According to defense lawyers, prosecutors also believe that Hispanics will not favor black
defendants because of what prosecutors perceive as historical antipathy.

Members of the judicial system argue the impact that exclusions of minorities have on sentencing, but many agree that the practice has a wide-ranging impact on the appearance of justice in Dallas County.

The threat of an all-white jury prompts some black defendants to waive their right to a trial and seek a plea bargain, lawyers say; other defendants change their pleas after learning that their jury contains no member of their race.

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"Black people don't like to go to trial, regardless . . . .They don't believe they're going to get a fair trial from white people,' explained defense lawyer Carl Gaines, the second black prosecutor hired by Wade.

Nor does the impact of black exclusion stop with defendants. Blacks called for jury service say the absence of blacks on juries causes them to question whether the judicial system is color-blind.

Many families of defendants leave the courtroom believing they have witnessed "white man's justice,' said Peter Lesser, a defense attorney and a Democratic candidate for district attorney.

"I think that hurts the judicial system because then they're not concentrating on the fact that Johnny is a no-good scumbag who beat up this old lady, stole her purse, put her in the hospital and nearly killed her,' Lesser said. "They're concentrating on the fact that, well, it's racist.'

Jessica Guillory was one of nine black potential jurors summoned in February for a case involving a black woman charged with welfare fraud. Mrs. Guillory said she felt intimidated after watching the panel reduced to an all-white jury.

"It made me know that I better not ever get in trouble, that I don't feel like justice is all it's supposed to be,' said Mrs. Guillory, one of six blacks dismissed by the state.

Baraka said blacks have been so conditioned to expect unfairness from the justice system that many do not consider jury service a possibility.

"As a defendant, we don't stand a chance. We're arrested more often, we're convicted more often, we receive more punishment. I mean, those are just the facts,' Baraka said. "And as honest, law-abiding citizens who believe in God and the American way and pay taxes to send our children to school, we're still told we're not anything of value.'

West, a defense attorney, said that even black professionals contemplate ignoring a jury summons, believing that because of their race, their opinions are not wanted by the justice system. "There's no sense going down there (to the courthouse) because they're going to strike them just because they are black,' West said.

Still other blacks have a more visceral reason for avoiding jury service, according to state District Judge Ed Kinkeade, who oversees operation of the central jury pool.

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"They tell me, "I'm afraid of the courthouse; nothing good happens at the courthouse, and I don't want to be a part of it,' ' Kinkeade said.

Racial discrimination in jury selection in Dallas County dates back at least to the 1930s when riots narrowly were averted after blacks appeared at the courthouse, insisting they be considered for jury service. In 1938, a black college president was thrown head-first down the courthouse steps by two white men when he refused to leave the central jury room.

In the 1940s, the U.S. Supreme Court, in three separate cases, told Dallas County that its method of selecting grand jurors was unconstitutional because it intentionally excluded blacks.

Evidence presented to the Supreme Court in one Dallas case in 1942 showed that no black ever had served on the Dallas County grand jury. Two grand jury selection officials said they had not summoned any blacks because they knew of no qualified black in the county, which then had 55,000 black residents.

The law was then the most common form of exclusion. Most blacks were simply disqualified from jury service because, in order to be an eligible juror, a person must have paid a poll tax -- a required fee for voting -- and be a property owner.

Blacks who did qualify for jury service in Dallas County were rarely served with summonses; those who were served and appeared at the courthouse frequently were told by judges that their services were not needed.

Not until 1947 did a black serve on a trial jury in Dallas County, 81 years after blacks were granted full rights as citizens by the 14th Amendment to the U.S. Constitution.

When Wade took office as district attorney in January 1951, he said, he made it a priority of his office to prosecute more crimes against blacks, because of the higher crime rate in predominantly black neighborhoods. That policy has remained a priority ever since, Wade said.

However, Wade said he has never had a policy of preventing blacks from serving on juries and has seated blacks on juries as far back as the 1950s.

But state District Judge Jack Hampton, who served on Wade's staff from 1958 to 1962, recalled being reprimanded by Wade when he allowed a black woman to serve as a juror on a misdemeanor drunken driving case. The case ultimately ended in a mistrial because the woman

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could not reach a verdict.

" "If you ever put another nigger on a jury, you're fired,' ' Hampton quoted Wade as saying. "That was the way things were back in 1958.'

Said Wade: "That didn't happen, so far as I'm concerned.'

Hampton said he did not put another black on a jury for the remainder of his career as a prosecutor.

Five years later, a treatise on jury selection credited to Assistant District Attorney Bill Alexander, then one of Wade's top aides, reiterated the belief that certain minorities were not appropriate state's jurors.

"Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated,' Alexander advised prosecutors. "I may like these people, but they will not do on juries.'

Alexander, now a federal prosecutor in Dallas, said he accepted blacks as jurors when he was in Wade's office and does not remember writing the treatise that advised against selecting minorities. "I just won't take responsibility for that,' he said.

In 1963, when the treatise appeared, the number of blacks appearing for jury duty remained small. But by the end of the decade, that number was increased significantly with the abolition of the state poll tax in 1966 and the advent of a new law designating voter registration lists as the source lists for juries.

It was then, according to defense lawyers, that prosecutors began in earnest to exercise their peremptory challenges against blacks.

In 1969, Sparling, then an assistant district attorney, delivered what became a highly publicized speech to a training session for prosecutors. Sparling's suggestions on jury selection, in fact, were the subject of a Time article in 1973 that carried the headline: "Women, Gimps, Blacks, Hippies Need Not Apply.'

In addition to minorities, Sparling's recommendations warned against selecting "free-thinkers,' people with physical afflictions and the overweight -- especially women and young men.

Wade and his assistants maintain the Sparling manual never was followed blindly and never has been read by most current prosecutors. They insist that prosecutors are trained to make individual decisions on jurors based on a combination of demographic factors and personal

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observations.

"Why do I want 12 white people on a jury when one of them is a person who's been unemployed for a while or not much of a work record, and came to court without a coat and tie, and you struck this young black business executive just because he was black?' said Jerry Banks, formerly one of Wade's top assistants. "That's dumb.'

Any prosecutor who allowed his racial prejudices to interfere with his judgment in selecting the best possible jury, Banks said, would not
have lasted long in Wade's office.

Defense lawyers claim that prosecutors with the least experience are the most likely to rely on stereotypes handed down by more experienced prosecutors.

"If Douglas MacArthur wrote his memoirs on the campaign in the South Pacific and you wanted to be a great general, what would you do?' asked Aguire, a former prosecutor. "If you're an inexperienced prosecutor, you do what the old master says.'

The process of culling black jury candidates is apparent almost every Monday in the Dallas County Courthouse. Dozens of blacks, along with other potential jurors, enter the central jury room and later are sent to a felony court for jury questioning. But when the jury is seated, blacks more often than not are left sitting in the audience.

Inside the courtroom, prosecutors commonly exercise peremptory challenges against blacks who voice similar views and appear to possess similar qualifications to whites who are selected on the jury.

The News witnessed prosecutors repeatedly dismissing black professionals in favor of blue-collar whites, even though the whites may not have lived in the county as long. The practice was particularly pronounced when the defendant was black.

Selecting a jury, lawyers agree, is part gamesmanship and part psychology, with each sides attempting to guess how the other will use its 10 peremptory challenges to sculpt a jury of people most inclined to favor its side of the case.

And while the intent behind the law allowing peremptory challenges is to obtain an impartial jury by eliminating signs of partiality, lawyers on both sides scoff at the notion that fairness motivates their use of the challenges..

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"Anybody who tries to sugar-coat it by talking about fairness and justice and equality is just talking through his hat,' said defense lawyer Mel Bruder. "We want people who are going to look at that case with prejudiced eyes.'

The means of identifying potentially hostile jurors can be as straightforward as listening to candidates' responses to questions, or as subtle as observing the quickness of the person's gait or the style of his hair.

Stereotypes, superstitions and instincts are integral parts of the selection process, lawyers admit, because of the limited time available to question potential jurors and the sparse biographical information provided on each candidate.

Opinions on whom to exclude are not scientific.

Alexander, one of Wade's former top assistants, for example, promulgated a policy that came to be dubbed "The Alexander Rule.' It advised prosecutors to exclude any person whose profession begins with the letter "p' -- including plumbers, painters, prostitutes and pimps. Alexander also advised against selecting "Yankees . . . unless they appear to have common sense,' "queers' and "anyone who has ever lived in California.'

Defense lawyer Tom McCorkle, a native of Highland Park, said he habitually uses peremptory challenges on persons belonging to any group "I loathe.'

"Republicans and people from the Park Cities, my own flesh and blood, you know, I wouldn't have on a jury,' McCorkle said. "I'm prejudiced about that, have bad feelings about them.'

Other defense lawyers say they routinely use their peremptory challenges to exclude police officers, retired military personnel, bankers and Lutherans, all of whom traditionally are viewed as prosecution-oriented. They say they look for open-minded people and "virgin jurors' untainted by exposure to the judicial system.

Prosecutors, on the other hand, say they look for conservative people with a stake in the community. Indicators of stability, they say, are a person's job, his family makeup and his personal appearance.

The current instructional manual given prosecutors by the Texas District and County Attorneys Association suggests that it is not advisable to select potential jurors with multiple gold chains around their necks or those who appear to be "free thinkers.'

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What distinguishes defense practices from prosecution practices, according to defense lawyers, is that prosecutors use their legally constituted peremptory challenges to accomplish an illegal result -- the disenfranchisement of blacks from jury service and the perversion of the guarantee of a jury of peers.

The result, they maintain, is that justice is skewed because an entire segment of the community is prevented from voicing its opinions on what constitutes justice in any individual criminal case.

The absence of blacks, lawyers say, deprives juries of a variety of perspectives and insight into human behavior, sometimes forcing white jurors to rely on stereotypes and biases in determining the fate of defendants.

"They are incapable of empathizing and unlikely to sympathize,' defense lawyer Tim Banner said of all-white juries. "They haven't lived inside a black skin. They don't know what it's like.'

The racial composition of a jury can be particularly critical in cases in which the state's evidence is primarily circumstantial, such as the identification of eyewitnesses.

Defense attorney Ed Sigel represented E-Systems engineer Lenell Geter in a celebrated armed robbery case that raised the specter of racial prejudice in the Dallas County's justice system. Sigel contended that white witnesses had more credibility with Geter's all-white jury than Geter, a black.

Every black eligible to serve on Geter's jury was dismissed by prosecutors, Sigel said.

"What they thought was, Geter was just another black young fellow that was out robbing,' Sigel said. "There's no question in my mind that if he were a white engineer, they would not have dealt so harshly with him and they probably would not have found him guilty. They would have listened to the evidence.'

Geter was found guilty of armed robbery and sentenced to life in prison. However, he was released after the district attorney's office agreed to give him a new trial, based on allegations of irregularities in his trial. Ultimately, all charges against Geter were dropped, after eyewitnesses identified another black man as the robber.

Racial makeup also can affect the tone of deliberations.

Defense lawyer Ron Goranson recalled a recent trial in which he defended a black man accused of murder, and overheard one member of

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the all-white jury discussing potential punishment for his client.

"Look, I already agreed with you not to find the nigger guilty of murder,' Goranson quoted the man as telling his fellow jurors, "but I'm not going to let you talk me into giving him probation.'

Opinions about the effects of a jury's racial composition on the verdict rendered are almost as varied as the opinion-givers. Some defense lawyers contend all-white juries tend to punish black defendants more severely; some say white juries are not as tough, particularly in crimes among blacks.

Most judges say juries, regardless of the racial makeup, almost always "do the right thing.'

Texas criminal case law shows that few cases have raised the issue of race-biased jury selection on appeal. In cases that have raised the issue, state appeals courts did not find reversible legal error. Those cases that have been overturned have been reversed by federal appeals courts.

Trial court judges acknowledge that the practice of prosecutors excluding blacks is common, but they contend that they have no authority to interfere with the exercise of peremptory challenges.

"A judge has no role in directing the prosecutor or the defense lawyer to do their peremptory challenges, or not do their peremptory challenges, in a particular manner,' said state District Judge Richard Mays.

Kinkeade and Baraka, however, said judges can prevent systematic exclusion through informal means by telling prosecutors they will not tolerate such behavior.

Last year, for example, Baraka barred one prosecutor from selecting
juries in his court, he said, when the lawyer did not give an adequate reason for excluding all black members of a jury panel.

In more than a dozen trials in Dallas and elsewhere in the state, The News observed only one defense lawyer complain about jury selection being racially biased. The lawyer, John Stauffer, complained that prosecutors denied his client a jury of her peers by dismissing all eligible blacks from the jury panel.

"This is not due process, it is not constitutional, it is against God,' Stauffer said after the trial.

No lawyer representing a black defendant questioned potential

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jurors about possible race bias before a jury was selected.

Defense lawyers in the trials said they did not raise the race issue because they did not want to anger the jury panel and because they said they did not believe even the most racist person would admit his bigotry.

But other lawyers said they consider it critical to ask prospective jurors whether the defendant's race will affect their ability to be fair. Some lawyers say that merely raising the issue can defuse racist tendencies in jurors.

"If you have a black defendant and a white complaining witness and you don't ask about racial prejudice, you ought to have your bar card jerked that very day,' said defense lawyer Richard Corbitt. "I think it's malpractice.'

Still other defense lawyers say that while they do not approve of the way prosecutors exclude minorities with peremptory challenges, they do not want to risk losing their ability to dismiss whomever they choose.

"It goes back to the old, old quote out of the (Texas) Court of Criminal Appeals. He may strike as many blows as he wants but they must be fair blows,' said Bruder, a Dallas defense attorney.

"And if all he (the prosecutor) is doing is striking blows for the state by excludo I don't think are going to do a good job for my client -- I'm in a hard position to criticize him for it,' Bruder said.

Baraka said racially discriminatory jury selection is not strictly a legal issue. "Morally, it's wrong because black people are people, and they pay these people's salaries with their tax dollars.

"They (prosecutors) are supposed to be protecting the interests of all citizens. And how can they protect their interests if you won't take them into the system?'

Defense lawyer Henry Ackels noted that laws can change.

"It wasn't until 1963, 175 years after the Constitution was adopted, that the courts said everybody has a right to have a lawyer . . . .It wasn't until Brown v. Board of Education that the courts decided everybody had a right to an equal education,' Ackels said.

"Sometimes, it takes 200 years before we start waking up to a constitutional right that we've had all the time.'

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1- 2 CHARTS (Credit:The Dallas Morning News *
Source:Based on a News analysis of 4,434 prospective jurors called for potential service in 100 felony trials in 1983-84. The 100 trials were chosen randomly.) 1.HOW DALLAS COUNTY JURIES BECOME VIRTUALLY ALL-WHITE 2.RACIAL MAKEUP OF DALLAS COUNTY TRIAL JURIES **PHOTOS** 1.Jon Sparling (No credit given) 2.Larry Baraka (No credit given) 3.District Attorney Henry Wade denies that his assistants use race as the sole factor in excluding people from juries.(Credit:The Dallas Morning News) 4.Robbery charges against Lenell Geter were dropped in 1984 after he served 16 months in prison. Prosecutors had dismissed all of the black prospective jurors before his trial. (Credit:The Dallas Morning News/David Woo) ; LOCATION: Charts - NR. Photos: 1. Sparling, Jon. 2. Baraka, Larry. 3. Wade, Henry. 4. Geter, Lenell.

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NEWS

MOST BLACKS TRUST SELECTION SYSTEM, SURVEY FINDS

Steve McGonigle, Ed Timms
The Dallas Morning News, 1986

Although almost all of them were excluded from Dallas County juries, two out of three blacks surveyed by The Dallas Morning News maintain faith in the jury selection system, and half believe it affords every person an equal chance to serve.

In a survey of 192 blacks -- all of whom were summoned for jury duty in 1983 and 1984 -- 15 percent said they believed race played a role in the selection process. Race also was the most common explanation given by those who claimed that the selection process was not fair.

Two jury consultants said The News' findings reveal a degree of trust in the jury selection system that belies the stereotype that black jurors are more sympathetic to minority defendants.

"Black people, much to the surprise of those who distrust them from the state's point of view, actually identify with the system and want it to endure,' said Robert Gordon, a forensic psychologist and lawyer.

Gordon and psychologist Leon Peek, who publish a monthly poll of attitudes of prospective jurors in Dallas County, said prosecutors and defense lawyers are foolish to rely on the stereotype as an indicator of who makes good jurors.

"It's naive to think that blacks empathize with a black defendant,' Gordon said.

The News' survey is based on telephone interviews conducted from Feb. 27 to March 3. Fifty-eight percent of the respondents were women, 71 percent were between the ages of 35 and 64, and 3 percent were unemployed.

Eighty percent of those surveyed said they were not chosen as

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jurors the last time they were summoned. Sixty percent of those said they did not know why they were not selected, and 5 percent believed race was the reason.

Gordon and Peek said they were surprised that 65 percent of those surveyed expressed faith in the jury selection system and 31 percent said they believed every defendant received fair treatment.

Sadie Mae Brown, 64, a maid who was selected as a juror in an attempted murder case, said: "I don't think it made any difference what color people were. Everybody was real nice to each other.'

Gordon said the positive attitudes represent an important social change.

"This tells me that we've come a long way from the '60s in terms of whether a black person feels alienated from the system or has access to the system,' said Gordon. "Whether, in fact, the black person has access to the system, they believe that they have access to it.'

Peek noted that the attitudes expressed in The News' survey reflect the middle-class status of the vast majority of respondents.

"There will be a group in the black and Hispanic communities that don't have faith in the criminal justice system, who fairly strongly believe that the most important single item attendant to a black prospective juror is the color of their skin,' Peek said.

"These are the same people, though, who also are going to be disenchanted with our whole governmental system and are not going to register (to vote).'

About one-third of the respondents expressed disenchantment when asked about specific reasons for people being excluded from jury service.

The four factors cited most often as a reason for being excluded from jury service were: being black, Hispanic, poor or younger than 35.

"They don't want us on criminal cases, especially if the defendant is black,' said Dallas postal worker Billy Barry, 39, during his interview with The News.

Dallas minister Frank Sowells, 54, pastor of the Eastside Church of God in Christ, said he had "no faith at all' in the system's ability to remain colorblind in selecting juries.

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3/9/86 DALLASMN 28A

"They seem to think that blacks have no fair judgment, so they seem to want all-white juries,' said Sowells, who has been summoned for jury duty three times without serving as a juror.

"They say you're supposed to get a jury of your peers,' said Louis Ford, 46, a Dallas teacher. "How is it a jury of your peers for a poor, young black man when he's tried by an all-white jury? When you're poor, you lose.'

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PHOTO (No credit given) Robert Gordon ; LOCATION: Gordon, Robert.

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3/9/86 Dallas Morning News 29A
1986 WL 4309274

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Sunday, March 9, 1986

NEWS

PICKING JURIES IS AN INEXACT SCIENCE, LAWYERS SAY Series: DISCRIMINATION IN JURIES

Ed Timms, Steve McGonigle

"Boots and bellies and tattoos' are what Corpus Christi defense attorney Doug Tinker looks for in a jury when his client is accused of driving while intoxicated.

A manual for prosecutors, circulated throughout the state, suggests that a potential juror "who was a sniper for the Marines in World War II . . . probably would have very little difficulty voting in such a way that the death penalty will be assessed.'

Marshall defense attorney Ned Dennis doesn't want business executives or schoolteachers on his juries, and avoids preachers "like the plague.'

While lawyers may disagree on who makes good jurors, they are perhaps unanimous on two points: Jury selection is an inexact science, and it can have far-reaching consequences. Some, in fact, believe the outcome of a case may well be decided by the time the jury is picked.

"For the state, if you could get 12 Nazi U-boat captains, you'd probably do all right,' said Steve Capelle, executive director of the Texas District and County Attorneys Association. "When I was a defense lawyer . . . if I could get a bunch of UT students or a bunch of professors, I'd probably do all right, too.'

In felony trials, both prosecutors and defense attorneys can, with peremptory strikes, bar up to 10 people from serving on a non-capital felony jury without giving any explanation. These peremptory challenges are the tool that determines a jury's texture, forming a union of diverse personalities and backgrounds held together only by the obligations of an oath.

Few law schools offer extensive training in jury selection. The process can be very brief, or it can involve extensive questioning,

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observation before the prospective jurors are brought to a courtroom, and even psychological profiles. Lawyers rely on strategies they have formulated through trial and error or by copying the methods of more experienced practitioners.

Stereotypes abound on both sides. Among prosecutors, for example, one widely accepted view is that minorities don't make good jurors. Defense attorneys often are wary of conservatives in thought and dress.

"Defense attorneys want the most liberal people on juries they can find,' said Arthur "Cappy' Eads Jr., Bell County district attorney and president of the National District Attorneys Association. "Now, if in a defense attorney's mind a minority is liberal, he wants him on the jury.'

But if a black or Hispanic doesn't get on the jury, Eads added, the defense attorney "cries foul.'

Austin defense attorney Roy Greenwood notes that in most felony cases, the prosecutors and the jurors will be white. Odds are, though, the defendants will be Hispanics or blacks.

From the prosecutor's standpoint, Greenwood said, "Why take a chance of a juror who is Hispanic or black getting on . . . who is intelligent enough to fudge his way through the questions during voir dire (questioning of prospective jurors) and then hang the jury? They don't want to take that chance. They don't want that racial sympathy.'

And Greenwood admitted thPO defense attorneys do the same thing. "He's going to try to get as many blacks on there as he can, and try to strike rednecks, military people,' he said.

Harris County District Attorney Johnny Holmes said prosecutors should base their peremptory strikes not on race but on each individual's background and experiences.

Holmes suggests that many minorities in the state, because of past oppression, might look at a police officer's testimony "with a great deal of chagrin' because either they know someone or have themselves seen "some officer bending the truth.' Those minorities would not be good jurors, he said, because of the possibility of residual hostility toward law enforcement figures -- not because of their race.

"Blacks seem to have had . . . more than their share of run-ins with the law, and as a result they view the legal system with a little more jaundiced eye,' said Teague defense attorney Ricky Sims.

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"You take your regular, middle-class, white Anglo-Saxon Protestant, and he views the police as basically good, honest people who are out there doing a good job. And if they bring somebody in, by God, they're guilty.

"The black community views the police officer as basically a redneck that is there to blame them for everything that goes wrong on every occasion and may take them in for things they might not necessarily have done or in their view may have had good reason for doing.'

If all blacks are kept off the jury, Sims said, a black defendant "is not going to get as objective a trial.'

Tinker, recognized by many attorneys as a master of jury selection, said he is convinced that prosecutors may be making a mistake by striking all blacks.

"Many times it's a black person who is a good citizen, a responsible citizen, a voter. He doesn't like the image that the criminal black gives to him.'

Said Warren Burnett, a veteran defense lawyer with offices in Odessa and Galveston: "It happens frequently that black people who are living in high-crime areas, and who beyond all others want the laws strictly enforced, are the objects of peremptory challenges by prosecutors.'

Tinker said that frequently, through the process of elimination, people get on a jury who do little more than occupy space.

"We call them rugs -- there are people you can take on juries that we figure don't make any difference. You end up with the four or five that really make the difference,' he said.

Ruben Bonilla, a Corpus Christi attorney and former president of the League of United Latin American Citizens, said prosecutors have developed new strategies in counties where the minority population is so large that all cannot be removed from a jury with peremptory challenges.

"It's not unusual for a prosecutor to . . . leave a black or Hispanic on, especially if they are not well-educated and therefore pose no threat, because they are perceived as being the type of people who will go along with the crowd,' Bonilla said.

"They're not going to create any waves in that jury room when you have a strong Anglo dominating-type personality as foreman.'

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This Appendix contains a photocopy of a newspaper article. A copy of the same newspaper article, printed from Westlaw, is reproduced in Appendix 13. The Westlaw copy is more legible, but does not include the photographs, charts and/or graphs that are in the photocopy.

sunday

Chance of rain
High in 40s Low in 40s
Details on Page 42A

DALLAS LIFE

Good ol' tale for Christmas

SPORTSDAY

Plano 24, La Marque 7
Stark 21, McKinney 9
Section B

HIGH SCHOOL PLAYOFFS

Jefferson 24 . . . . . Cuero 0
Shiner 18 . . . . . Mart 0

Georgia Tech 63, SMU 54

Mavs 130, Lakers 119

The Dallas Morning News

Texas' Leading Newspaper © The Dallas Morning News, 1986 | Dallas, Texas, Sunday, December 21, 1986 | 22 Sections | 75 Cents

A PATTERN OF EXCLUSION

Conroe trial a case in point

By Steve McGonigle
and Ed Timms
Staff Writers of The News

CONROE, Texas — The law officers who prosecuted him and the jury that sent him to death row share a common belief about Clarence Lee Brandley: He is a savage man, a homicidal sexual deviant whose criminal appetite will end only with his execution.

Brandley's supporters, though, believe the 35-year-old black man is a living symbol of racial injustice, an innocent victim of a frightened small town's judicial system that judged him not by law and evidence but by the color of his skin.

These conflicting portraits lie at the heart of a controversy that has lingered more than six years in this city of 30,000 about 40 miles north of Houston on Interstate 45.

Indeed, if nothing else, *Texas v. Brandley* may be a classic example of how minorities perceive the justice system after having been denied membership on a jury that determined the fate of one of their members.

"It is not enough in this coun-

Please see PROSECUTOR on Page 21A.

DEATH PENALTY CASES: RACIAL MAKEUP OF JURIES BY COUNTY (in percent)

SOURCE: The Dallas Morning News

The Dallas Morning News

Blacks rejected from juries in capital cases

By Ed Timms
and Steve McGonigle
Staff Writers of The News
© 1986, The Dallas Morning News

For all 15 men tried for capital murder in Dallas County since 1980, prosecutors got what they wanted: the death penalty and overwhelmingly white juries.

Of the 180 Dallas jurors who condemned those men, only five were black. There were 37 other blacks legally qualified to serve on the juries, but prosecutors barred 34.

The prosecutors' use of peremptory challenges — dismissing potential jurors without having to give a reason — meant that nine of every 10 blacks qualified for the capital murder juries were excluded. That pattern of racial bias, widespread throughout Texas, is described by one black former prosecutor as "the most dangerous kind of discrimination, because it is oftentimes camouflaged with legal clichés."

DISCRIMINATION IN JURIES
Bias in death cases

■ Basis for findings. 22A
■ Survey of blacks' views. 22A

Prosecutors say blacks routinely are excluded from juries because many are soft on defendants, perhaps as a result of their historical distrust of the criminal justice system.

Such exclusion in Dallas County meant that four of the five blacks sent to death row were tried by all-white juries. Two of those in fact, Larry Smith and Michael Wayne Evans, were executed by injection this year after

Please see SOME on Page 20A.

Some experts see racially based pattern

John Fearance looks out of a cage that "dangerous" inmates are kept in during interviews.

"If you're in a death penalty case and you've got a black kid who grew up ... in the ghetto, and was [other] low, and you've got 12 middle-class, white jurors, you've got nobody on that jury who by definition can identify with your client."

— Dennis Bankey, former legal director, Southern Poverty Law Center

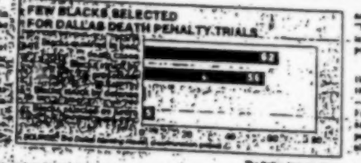
RACIAL COMPLEXION OF DEATH ROW INMATES, JURIES*

County	Number of Cases	Black Defendants	Blacks with all white jury
Dallas	11	7	4
Harris	99	37	19
Bexar	10	7	2
Tarrant	9	7	2
Travis	7	3	2
El Paso	6	0	0
Jefferson	4	3	3
Nueces	3	2	1
Montgomery	3	1	1
Lubbock	2	1	0
McLennan	2	1	0
Smith	2	1	0
Galveston	2	1	0
San Patricio	2	2	0
Total	172	93	51

*All cases involving death row inmates from 15 counties sentenced through Thursday, Aug. 1, 1986.

Clarence Brandley is on death row after an all-white jury in Conroe convicted him of killing a white girl.

Jury choices undermine blacks' trust

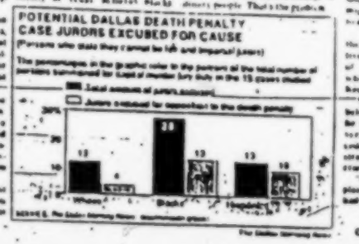


Troy Woods was the only black juror in the 13 Dallas County capital murder trials to hear a case against a black defendant.

POTENTIAL DALLAS DEATH PENALTY CASE JURORS EXCUSED FOR CAUSE

(Persons who state they cannot be fair and impartial jurors)

The percentages in the graphic color in the blacks of the total number of persons summoned for Legal Jurisdiction jury duty in the 13 Dallas District Courts.



Prosecutor cites fear of pressure on black jurors

I was more or less what you would call a compulsive gambler, loved the fast life. I was in the process of slowing down, getting a place to settle down.

— Clarence Brandley, death row inmate

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Conroe defendant still hopes to be freed

Continued from Page 31A

Racism and injustice, according to State District Judge Jim Kesahan, belong in Conroe's past. "You'll find that these days Montgomery County is not that benighted."

"I think we all expressed some guilt because the young lady (Cheryl Fergeson) was a visitor of this town. And I think we took it on ourselves to feel that guilt."

— Carl Barton Jr., mayor of Conroe

"Clarence (Brandley) was black and there was a dead white girl, and he was the only one on trial and he was an easy target."

— Don Brown, defense attorney

Half of blacks back death penalty, survey finds

Computer analyzed jury selection data

This Appendix contains the text of a newspaper article, printed from Westlaw. A photocopy of the same newspaper article is reproduced in Appendix 12. The photocopy is less legible, but includes photographs, charts and/or graphs which are not included in this Appendix.

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1986 WL 4356535

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Sunday, December 21, 1986

NEWS

A PATTERN OF EXCLUSION

Blacks rejected from juries in capital cases Series: DISCRIMINATION IN JURIES

Ed Timms, Steve McGonigle
1986, The Dallas Morning News

For all 15 men tried for capital murder in Dallas County since 1980, prosecutors got what they wanted: the death penalty and overwhelmingly white juries.

Of the 180 Dallas jurors who condemned those men, only five were black. There were 57 other blacks legally qualified to serve on the juries, but prosecutors barred 56.

The prosecutors' use of peremptory challenges -- dismissing potential jurors without having to give a reason -- meant that nine of every 10 blacks qualified for the capital murder juries were excluded. That pattern of racial bias, widespread throughout Texas, is described by one black former prosecutor as "the most dangerous kind of discrimination, because it is oftentimes camouflaged with legal cliches.'

Prosecutors say blacks routinely are excluded from juries because many are soft on defendants, perhaps as a result of their historical distrust of the criminal justice system.

Such exclusion in Dallas County meant that four of the five blacks sent to death row were tried by all-white juries. Two of those, in fact, Larry Smith and Michael Wayne Evans, were executed by lethal injection this year after twice being tried and convicted by all-white juries.

The only black allowed to pass judgment against another black was one who told prosecutors that Texas' form of execution -- lethal injection -- was too humane. "It's too quick,' he testified. "They don't feel the pain.'

These are among the findings of an ongoing investigation by The Dallas Morning News examining jury selection in Dallas and 14 other

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Texas counties. The analysis included a review of the records of 133 of 232 inmates on death row as of Aug. 1.

The 15 counties, which accounted for almost 60 percent of inmates on death row, represented major geographic regions and included the five largest metropolitan areas in the state. In counties whose black population amounted to at least 10 percent, the investigation also found evidence of racial discrimination in jury selection.

In Dallas County capital murder cases since 1980, blacks had a 1-in-12 chance of being selected as jurors, compared to a 1-in-3 chance for whites and a 1-in-4 chance for Hispanics.

Capital cases, which carry mandatory life sentences or the death penalty, are limited to murders of law enforcement officers or slayings committed in the course of certain other felonies, including robbery, rape and kidnapping.

Several legal experts and community leaders say the findings show that peremptory challenges are being used by prosecutors as tools of discrimination against defendants facing the most visceral decision of criminal justice -- execution.

Frank Williams, criminologist with the Criminal Justice Center at Sam Houston State University in Huntsville, analyzed The News' findings. The probability that blacks were eliminated by chance is "1-in-10,000,' he said.

State District Judge Larry Baraka, Dallas' first black felony prosecutor, said The News' findings reaffirm his conclusion that race is the primary reason prosecutors use peremptory challenges to bar blacks.

"Knowing Dallas County and knowing the DAs' practices, I know that's what they're doing.'

Jack Boger, assistant counsel for the NAACP Legal Defense Fund, said the findings establish a pattern:

"The minority community is being told that it doesn't count as much in the criminal justice system. . . . .They certainly don't count as jurors and they're being told they need not apply, or if they apply, they will not be, in effect, hired as jurors.'

In a series of articles published last March, The News documented virtually the same pattern of discrimination in 100 randomly selected felony trials in Dallas County.

In April, a landmark U.S. Supreme Court decision, Batson v.

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Kentucky, prohibited . . use of peremptory challenges in a racially discriminatory manner, saying such practices undermined "public confidence of our system of justice.' In a concurring opinion, Supreme Court Justice Thurgood Marshall cited The News' findings as an example of "systematic exclusion' that violated the 14th Amendment guarantee of due process under the law.

Henry Wade, Dallas County's district attorney for 36 years, said he did not know the specific reasons his prosecutors excluded blacks in capital cases. Wade speculated these blacks were not seated as jurors because prosecutors believed them to be sympathetic toward defendants.

Wade said his office has tried to impanel more blacks on juries in the past five to 10 years. "But I don't believe in putting someone on there just because he's black,' Wade said. "I want someone on there who's going to vote for the state.'

Assistant District Attorney Norman Kinne, who has tried 11 capital cases, more than any other prosecutor on Wade's staff, suggested that most blacks were excluded because they expressed reservations about the death penalty.

Kinne said prosecutors have not intentionally selected all-white juries. "It's just the way things fell,' he said.

While The News' analysis revealed a pattern of prosecutors barring blacks, blacks themselves also shoulder some of the responsibility for the prevalence of all-white juries in capital cases.

Potential jurors in capital cases are screened individually by both prosecutors and defense attorneys. If during the questioning, they state they cannot be impartial, the judge dismisses them for "cause.' After screening, each side has 15 peremptory strikes that allows it to cut potential jurors without explanation. The first 12 remaining are impaneled as jurors.

In Dallas County, blacks are three times more likely than whites to be excused for cause after saying they cannot assess the death penalty, The News' inquiry showed.

In Harris County, only 8 percent of the jurors in capital cases were black. But blacks there were more likely to hear the cases of other blacks; 65 percent of black defendants had at least one peer on his jury, by far the highest percentage among the 15 counties examined by The News.

Almost 80 percent of the black inmates on death row from the

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remaining 14 counties faced all-white juries.

"Never in the history of the state of Texas has a white person been sent to death by an all-black jury,' said Harris County Justice of the Peace Al Green, president-elect of the Houston branch of the NAACP. "It has never been done. . . . .Somehow we've come to accept the notion that it's all right for a black defendant to be put to death by an all-white jury.'

John Fearance and Ronald Curtis "Buffalo' Chambers are two of the three surviving black inmates on death row from Dallas County. Counting retrials, both have been tried and convicted twice by all-white juries.

"There's no justice to it,' Fearance said from behind a heavy mesh screen at the Texas Department of Correction's Ellis I Unit near Huntsville. Fearance was convicted of the 1978 stabbing death of an East Dallas man while burglarizing his house.

"They have their mind made up,' he said. "They've already tried you before they've actually tried you.'

Chambers, on death row for the 1975 slaying of a Texas Tech University student during an abduction-robbery, said prosecutors didn't want to take a chance at justice.

"You're sitting there and you start seeing only white people going on the jury, right? Well if you're a black dude, and you see all these white people that are going to be on your jury -- the judge, too -- you want somebody who can understand you.'

Houston lawyer Percy Foreman has, by his own estimation, tried more death penalty cases than anyone. He believes that, given the same evidence, a black is more likely to be sentenced to death than a white.

The reason, Foreman asserts: "Racial prejudice on the part of the jurors.'

Beaumont lawyer Gaylyn Leon Cooper, the first black felony prosecutor in Jefferson County, believes black jurors mitigate racist impulses.

"The black juror won't go in and say, "Well, you know how these people are,' or "I'm afraid of these people,' ' Cooper said.

Minority representation on capital murder juries also is seen as a way to ensure that mitigating circumstances are at least considered.

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"If you're in a death penalty case and you've got a black kid who grew up . . . in the ghetto, and was fatherless, and you've got 12 middle-class, white jurors, you've got nobody on that jury who by definition can identify with your client,' said Dennis Boskey, former legal director of Southern Poverty Law Center in Montgomery, Ala.

State Sen. Craig Washington, a Houston defense lawyer, said the secret deliberations of 12 white jurors sends a negative message to the minority community.

"If I'm outside the door when the decisions are being made, I'm suspicious of the decision,' Washington said. "If you're being fundamentally fair and your decision is right, then you shouldn't mind me watching it being made.'

The Rev. Zan Holmes, pastor of Dallas' St. Luke Community Methodist Church and a former Texas legislator, said blacks more often are crime victims than whites. "Blacks have a lot at stake in the criminal justice system and want to see justice done.'

For more than 20 years, the same U.S. Supreme Court decision that condemned the use of peremptory challenges "to deny the Negro the same right to participate in the administration of justice,' in practice gave prosecutors free rein.

Defense lawyers complained that Swain v. Alabama demanded an unattainable standard of proof; the ruling permitted the use of peremptory challenges in individual cases, and required documentation of systemwide discrimination.

But under the guidelines of the Batson decision in April, if a defense lawyer shows evidence of "purposeful racial discrimination' during a single trial, prosecutors can be compelled to prove they didn't use their peremptory challenges solely to exclude blacks.

The debate now centers on the application of Batson in actual courtroom situations. Prosecutors say it contradicts the traditional intent, which allowed a person to be excused without explanation.

Defense attorneys contend the ruling can easily be circumvented.

"A lot of time is going to be wasted because the prosecutor can always come up with some other reason that would appear equally valid,' explained Houston lawyer Donald W. Rogers Jr.

There is a wide gap between knowing peremptory challenges are being used racially and proving it, according to John Paul Davis, Jefferson County's first black prosecutor and now a municipal judge in Beaumont.

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"The subtleties of discrimination within the criminal justice system are the most dangerous kind of discrimination, because it is often times camouflaged with legal cliches,' he said. "Lawyers can always use one word when they want to use another.'

However many lawyers believe Batson can be used to curb prosecutors' use of peremptories along racial lines.

"A good, articulate prosecutor who actually chooses (jurors) on methods other than race will have no problem with Batson,' said Dallas lawyer Richard Alan Anderson. "If you've got a prosecutor who's obviously choosing on a racial basis and is just trying to make excuses to justify that . . . then you're going to catch those folks.'

University of Iowa law professor David C. Baldus, a nationally known expert in capital murder trials, suggests that lessons learned in job discrimination suits might be applied to jury selection.

In those cases, employers have been found liable for rejecting minority job applicants whose lawyers proved they had the same characteristics as whites who were hired.

Prosecutors who have been successful after picking all-white juries are not likely to change their formula. And that formula, many defense lawyers claim, was etched in an era of segregation and passed blindly to a new, more enlightened generation that nevertheless is practicing age-old discrimination.

"The practice that's been going on in that courthouse ever since I've been involved in it -- as both a prosecutor and a defense attorney -- is that you just don't question success,' said Brad Lollar, president-elect of the Dallas County Criminal Bar. "They've been picking their juries that way forever . . . and it's always worked.'

Lollar, a Dallas County prosecutor for four years before going into private practice, said no one "necessarily . . . came up to me and said directly, "Don't take a black on a jury.' It wasn't that obvious.

"What we were told to do was go around and watch how the experienced prosecutors did things. And it didn't take a Rhodes scholar to figure out that one thing they were all doing was excluding minorities from the jury.'

For Houston lawyer James Stafford, who has appealed the selection of an all-white jury in a capital murder case, the irony is that many blacks eliminated are "probably a lot stronger state's jurors than

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some of the white people.'

While The News' study showed a higher percentage of blacks on Harris County capital murder juries than on Dallas juries -- 8 percent versus 3 percent -- prosecutors there nonetheless used peremptory challenges to strike more than 90 percent of the black potential jurors.

Harris County District Attorney Johnny Holmes said his prosecutors do not use peremptory challenges solely because of race, but added: "I don't know if we can divorce race from individual philosophies of the potential juror.'

Holmes argues that many blacks perceive the judicial system still tainted by historical experiences of racial prejudice and injustice.

"I still get a rap sheet every now and then on a black defendant and somwhere earlier in his arrest career, it shows "black man walking in a white neighborhood.' Now, when you have been subjected to that, or you know people who have, or your family members have . . . it makes one a little bit skeptical of the system.'

And that skepticism, Holmes said, might be reflected in "some type of turn-the-other-cheek punishment' for a capital murder defendant.

Houston lawyer Carolyn Garcia, who has handled the appeals of several death row inmates, disagrees. She points out that blacks who are removed with peremptory challenges already have sworn they can follow the law. And she fears that the exclusion of blacks from juries is creating yet another disenfranchised generation.

"You can never get off the treadmill of negative experiences,' she said. "The only way to break that cycle is to invite those people into that system.'

Dennis Boskey, a Montgomery, Ala., lawyer who specialized in capital murder cases, described Holmes' position as a form of double jeopardy.

"You're saying, "Well, we beat you over the head then and now we're going to kick you off the juries because we beat you back then,' ' Boskey said.

The search for the ideal juror frequently leads prosecutors and defense lawyers along different routes. They look at a disparate assortment of intangibles to guide them, from how a potential juror looks and how much money he makes to the kinds of books he reads.

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"You want a guy w[illegible] roots in the community,' explained Kinne, who teaches other Dallas County prosecutors how to select juries in capital murder cases. "Usually he has some sort of responsible position that he's held for a number of years. None of his close family or friends has been involved in crime or spent time in the penitentiary. He has a basic understanding of the law . . . and doesn't have any disagreement with any of the law.'

Dallas defense attorney Mike Byck, who defended Chambers and two others on capital murder charges, says each side has its own criteria for jurors.

"The district attorneys want a bunch of jack-booted, marching fascists to sit on a capital murder jury,' Byck said. "I want a bunch of yuppie, knee-jerk, no-backbone liberals to sit on my jury because I don't want them to kill my man. They want them to kill the guy.'

Jurors on Texas capital cases once were required to swear that the potential outcome -- either death or life imprisonment -- would not affect their deliberations. Those who could not were excused from jury duty for cause.

But in 1980, the U.S. Supreme Court ruled that only individuals who say they cannot assess the death penalty under under any circumstances can be excused for cause. The case, Adams v. Texas, involved a Dallas County defendant tried for killing a police officer.

In Adams, Supreme Court justices concluded: "To exclude all jurors (for cause) who would be in the slightest way affected by the prospect of the death penalty . . . would be to deprive the defendant of the impartial jury to which he or she is entitled under the law.'

Some legal scholars, as well as Supreme Court Justices William Brennan and Thurgood Marshall, claim prosecutors are abusing the same constitutional rights protected in Adams.

Brennan, in a recent dissenting opinion, wrote that using peremptory challenges to exclude everyone with reservations about capital punishment creates a "hanging jury.'

Many blacks in Dallas express some reservations about the death penalty, yet are kept in the jury pool after saying they could assess death in some circumstances. Kinne said those potential jurors are the ones prosecutors are told to strike with peremptory challenges.

"We teach (prosecutors) that if someone expresses doubts about his ability to follow the law, then you get rid of him,' Kinne said.

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"If it turns out that they're black, that's just how it falls.'

Dallas lawyer Royce West, a black former prosecutor and recent Democratic candidate for district attorney, said he doubts Kinne's explanation of why blacks have been excluded.

"I know, based on my experience not only as a prosecutor but as a defense lawyer, that black people are just as interested in justice and making sure that individuals who don't belong on the street stay off the street.'

A review of trial transcripts in the 15 Dallas County capital cases showed that 33 of the 56 blacks struck by prosecutors voiced reservations about the death penalty. The remaining 23 stated they could assess the death penalty.

Beneath the exacting legal minutiae, the criminal justice system is fueled by the same stereotypes held by the community at large.

In a 1969 speech that later was incorporated into a statewide training manual for prosecutors, former Dallas County Assistant District Attorney Jon Sparling emphasized that minorities "almost always empathize with the accused' and do not make good jurors.

That perception, says defense lawyer Byck, is evident today in prosecutors' jury selection in capital cases.

"I get the impression that they use a racial stereotype much the same, and literally it almost comes out of the Jon Sparling manual where blacks, Jews, well-educated women are too sensitive, too equivocating, too whatever to put on a capital murder jury,' Byck said.

Gaynelle Jones, a black Harris County felony prosecutor, said eliminating people who aren't likely to be receptive to the prosecutor's case -- regardless of their race -- is just common sense.

"I just can't see myself stacking the cards against me,' said Ms. Jones.

Said John Paul Davis, the Jefferson County municipal judge: "I do believe to some extent blacks tend to be more inclined not to be spoonfed by the prosecution. They tend to be a little more independent. . . . .In fact, I think that makes them more valuable on a jury.'

Davis said that while blacks are chosen for some juries, they are "habitually excluded from juries when blacks are defendants, which

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smacks of the fiercest kind of racism.'

Of the four death row cases from Jefferson County examined by The News, one inmate is white, the others black. The News' analysis showed that one black juror was impaneled in the white defendant's trial; the three blacks were sentenced to death by all-white juries.

"We look at who will enforce the law as we see it, and who won't,' said Jefferson County District Attorney James S. McGrath. "More blacks, through my experience, would be against, or weaker on, the death penalty than other groups. We may be influenced to that extent.'

However, McGrath said, his prosecutors never have "systematically excluded' any ethnic or racial group.

"We're cognizant of the fact that certain groups of people make the best jurors,' he said. "If you want a fine jury, get yourself 12 Germans on there, and you're going to fly. Statistically, German people are more strict in law enforcement than any group that we know of.'

Beaumont lawyer Cooper, a former assistant on McGrath's staff, said he was never told not to let blacks on a jury, but felt some pressure.

"Any time a jury came back with what was less than considered to be the appropriate punishment from a prosecutorial point ofview, then a reason had to be attached," he said. "And I might be asked, "How many blacks were on the jury?' '

John Vance, who will succeed Wade Jan. 1 as Dallas County district attorney, said he intends to record the race of each prospective juror in felony trials, and will personally question any prosecutor whose use of peremptory challenges appears to be racially motivated.

In Tarrant County, a written policy prohibits the systematic exclusion of minorities from juries. Juries that convicted four to death row were examined by The News -- three were all-white, the fourth, which convicted a black defendant, included one black juror.

Tarrant County District Attorney Tim Curry said many minorities are "weak on capital punishment' and excused with peremptory challenges for that reason.

Dallas lawyer Mel Bruder, who represented Randall Dale Adams, the defendant in Adams, notes that peremptories also eliminate

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individuals who won't be fair to the defendant, and warns against too vigorous an attack on their use.

"If you don't like them because they're being used in some discriminatory manner, then they'll have to be abolished,' Bruder said. "And I think that would be a greater disservice to the defendants than having them, and allowing the state to strike people who are . . . weak.'

Prosecutors argue that their first responsibility is to get a conviction and find the jurors who will give it to them.

Troy Woods was the only black juror in the 15 Dallas County capital murder trials involving a black defendant. His views on the death penalty were unwavering during jury selection.

"What I call punishment is back to the old Indian days,' he said. "Pour some honey on them and stake them out over an antbed. . . . .That's what I call punishment.'

Woods, 46, was a juror in the trial of Thomas Joe Miller-El, who was sentenced to death in March for the robbery-murder of an Irving motel clerk.

By the time a trial begins, said Holmes, the Houston district attorney, "We've resolved any doubt about the guilt of the accused in our hearts -- this is a guilty son of a bitch and we're trying to find somebody who's going to put him in the pen.'

Sammie Lee Parker was one of four blacks whose opposition to the death penalty kept him from serving on the all-white Dallas jury in 1985 that tried Ronald Curtis Chambers and sentenced him to death.

"I guess the main reason that I'm against the death penalty . . . is maybe 80 or 90 percent of the time there is a black man involved,' Parker testified.

"I am not defending them, because I know we do wrong like everybody, but I think the black man normally gets the tail end of (the) deal.'

Parker's view is shared by many who claim that blacks historically have received harsher treatment from a jury system that has excluded them.

For that reason, many blacks mistrust the legal system. Almost half the blacks summoned for jury service in Dallas County were excluded by the judge because of their stated opposition to the death penalty.

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"Minorities correctly realize . . . that they have little chance at the courthouse, or at least that they're running behind,' said Corpus Christi lawyer Doug Tinker, an authority on jury selection in capital trials. "They go down there and they're scared to death. They're like a rabbit in the headlights of a car.'

George C. Wright, director of Afro-American studies at the University of Texas, believes blacks and whites see the law differently: "The whites see the law as the protectors. Black people see it as the oppressor.'

In 1924, when Texas began using the electric chair for executions, the first four inmates seated -- all in one night -- were black. From 1924 through 1964, 504 defendants were sentenced to death; 63 percent of the 361 defendants actually executed were black.

The last to die in the Texas electric chair -- on July 30, 1964 -- was 27-year-old Joseph Johnson Jr., a Houston black convicted of murder.

Because of several factors, executions in Texas were interrupted from 1964 to 1981: anticipation of a U.S. Supreme Court ruling on the constitutionality of the death penalty; a sweeping 1972 Supreme Court decision that overturned potentially discriminatory state laws; and appeals that tested Texas' capital punishment law passed in 1973.

On Dec. 7, 1982, in Huntsville, Charlie Brooks Jr., a Fort Worth black convicted of killing a car dealer, became the first inmate to be executed by lethal injection in the nation.

Fort Worth lawyer Danny Burns unsuccessfully appealed Brooks' conviction, arguing that the Texas death penalty was "a disproportionately severe and excessive punishment . . . being imposed pursuant to a pattern of racial, economic, and sexual discrimination.'

Statewide application of the death penalty echoes the pattern in Dallas County. Since 1924, 17 whites and 40 blacks from Dallas County have been executed.

Five whites and 17 blacks from Dallas County have been executed during Wade's tenure as district attorney. Ten of the blacks were executed before 1964 for what are no longer capital offenses -- nine for rape and one for robbery with a firearm.

Gerald Goldstein, general counsel for the Texas Civil Liberties Union, said the attitude among many blacks against the death penalty should surprise no one.

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"It should come as no shock to us any more than if we went to Spain after the Inquisition and could find the few Jews left and ask them what they thought,' Goldstein said. "I imagine they would have some problems with the system at that point.'

Houston lawyer Ron Mock, a black, believes the solution to a cycle of skepticism -- one that makes blacks distrust the system and the system mistrust them -- can't be written in the law.

"My changes would involve . . . the hearts and minds of people as a whole to see each other as a brother as equal folks under the law,' he said.

"Those are the things you'd have to change. You'd have to change ordinary people. That's the problem.'

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1.GRAPH (Credit:DMN * Source:DMN) DEATH PENALTY CASES: RACIAL MAKEUP OF JURIES BY COUNTY 2.CHART (No credit given) RACIAL COMPLEXION OF DEATH ROW INMATES, JURIES 3.PHOTO (Credit:DMN-Jan Sonnenmair) John Fearance looks out of a cage that "dangerous" inmates are kept in during interviews. 4.PHOTO (Credit:DMN-Jan Sonnenmair) Clarence Brandley is on death row after an all-white jury in Conroe convicted him of killing a white girl. 5.GRAPH (Credit/Source:DMN) FEW BLACKS SELECTED FOR DALLAS DEATH PENALTY TRIALS 6.GRAPH (Credit/Source:DMN) POTENTIAL DALLAS DEATH PENALTY CASE JURORS EXCUSED FOR CAUSE 7.PHOTO (Credit:DMN-Jan Sonnenmair * This Photo ran in the BULLDOG Edition ONLY) Calvin Williams, a Houston man on death row, was convicted by an all-white jury. 8.GRAPH (Credit/Source:DMN * This Graph ran in the BULLDOG Edition ONLY) CHANCES OF SERVING IN DALLAS DEATH PENALTY TRIALS, BY RACE ; LOCATION: Graphs - NR. Photos: 1. - 2. Oversize Black/White File. 3. Prisons & Prisoners - Texas.

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NEWS

A PATTERN OF EXCLUSION Conroe trial a case in point Series: DISCRIMINATION IN JURIES

Steve McGonigle, Ed Timms

CONROE, Texas -- The law officers who prosecuted him and the jury that sent him to death row share a common belief about Clarence Lee Brandley: he is a savage man, a homicidal sexual deviant whose criminal appetite will end only with his execution.

Brandley's supporters, though, believe the 35-year-old black man is a living symbol of racial injustice, an innocent victim of a frightened small town's judicial system that judged him not by law and evidence, but by the color of his skin.

These conflicting portraits lie at the heart of a controversy that has lingered more than six years in this city of 30,000 about 40 miles north of Houston on Interstate 45.

Indeed, if nothing else, Texas v. Brandley may be a classic example of how minorities perceive the justice system after having been denied membership on a jury that determined the fate of one of its members.

"It is not enough in this country for things to be right, they must also appear right,' said Harris County Justice of the Peace Al Green, president-elect of the Houston chapter of the NAACP. "And this case just doesn't look right.'

Brandley, his attorneys contend, is a condemned man because bigotry blinded an all-white Montgomery County jury to a reasonable doubt that Brandley raped and murdered a white, 16-year-old girl.

In fact, Brandley's lawyers point to at least two other suspects and to scientific evidence that suggests the rapist-murderer could have been a white man.

Brandley, a custodian at Conroe High School, was convicted of capital murder in the Aug. 23, 1980, slaying of Cheryl Dee Fergeson.

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Miss Fergeson, studen. manager of the Bellville High school volleyball team, was slain at Conroe High, where she was attending a volleyball tournament.

"The jury had formed an opinion before the trial even started,' said Brandley in a dispassionate monotone as he sat in an interview room at the Ellis Unit, near Huntsville.

"And after the trial had proceeded so far, I felt like the jury was just disinterested in hearing the facts.'

The Rev. J.P. Jones, a Baptist minister and a member of Conroe Concerned Citizens, a black group that raised funds for Brandley's defense, said Brandley "was railroaded completely' by the justice system.

"The system in Clarence's case was corrupt,' said Don Brown, one of Brandley's defense attorneys. "It was completely prejudiced against him. That jury knew the community expected them to convict, and they were not strong enough to stand up to it and examine the evidence.'

Had prosecutors allowed blacks to serve on Brandley's jury rather than excluding them with peremptory challenges, Brown suggested, the state's evidence would have been found lacking and Brandley would be free.

Texas laws allow both the prosecutor and defense attorney to exclude any 15 prospective jurors without giving a reason, called peremptory challenges. The U.S. Supreme Court ruled in April that such challenges could not be used simply for racial reasons.

Brandley's defense attorneys have asked the Texas Court of Criminal Appeals to grant Brandley a new trial based on new evidence, illegally excluded blacks and suppressed evidence that could have aided Brandley.

Jim Keeshan, the district attorney who prosecuted Brandley, said the state did not try Brandley because he was black but because the evidence pointed to him as the murderer of Miss Fergeson.

Keeshan, now a state district judge in Conroe, acknowledged he struck all the qualified blacks from both the jury that convicted Brandley and an earlier jury that deadlocked on his guilt; he did so, he said, be[illegible]se he feared black jurors might succumb to outside pressure to acq[illegible] Brandley.

"I felt that my job dictated that they (jurors) not only be supportive of law enforcement, but be free of sympathy for the

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defendant, which woul. affect the verdict,' Keeshan said.

While Keeshan "unabashedly' believes Brandley is guilty, he said he regrets the continuing controversy surrounding the case. He conceded that a different jury selection strategy would have muted the cries of racism.

"Obviously,' he said, "that complaint would have been removed had there been a black on the jury.'

Conroe before the 1970s was just another sleepy sawmill town and railroad junction in the piney woods of East Texas. Its population was native Texan, schools were segregated and politics were Democratic.

But the character of the county was overhauled in the 1970s by the building of The Woodlands, a sprawling residential development near the Harris County line, and resort developments along Lake Conroe.

By 1980, the county's population had swelled from 50,000 to 128,000. One-third of the population was born out of state, and almost two of three people commuted at least 45 minutes to work.

The boom did little to improve the status of blacks. As in 1970, about half of all black families lived below the poverty level. While average family income in the county tripled between 1970 and 1980, the average income of black families remained less than half that of white families.

Crime also was on the rise. Although Conroe recorded only six murders in 1980, the city's murder rate of 33.4 slayings per 100,000 population was only slightly less than that of Dallas.

Still, the slaying of Cheryl Fergeson was something unusual. The teen-age honor student had been abducted, strangled and sexually assaulted at Conroe High, a place residents regarded as a safe haven, indeed "almost like a church,' according to one resident.

"Shock would be a minute description,' said Conroe Mayor Carl Barton Jr., recalling the community's reaction. Adding to that horror, he said, was the fact that the victim, a resident of the Kenney community near Bellville, was in Conroe on a school trip.

"I think we all expressed some guilt because the young lady was a visitor of this town,' Barton said. "And I think we took it on ourselves to feel that guilt.'

The murder occurred 10 days before the start of the 1980-81

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school year; Conroe police reacted with a sense of urgency.

"All our people have been called in,' Capt. Monty Koerner, the department's chief of detectives, told reporters the day Cheryl's body was found. "This is priority one. We hope to have this thing wrapped up before school starts.'

Brandley's defense attorneys later contended that police were pressured by parents, who deluged them and school officials with telephone inquiries about the progress of the investigation.

"People had completely tied up the phone lines at the school, saying they weren't bringing their little daughters to school until that rapist was caught,' said Brown, a white defense attorney and former state legislator.

But Jesse Harwell, then principal of Conroe High School, said he could not recall receiving any phone calls from hysterical parents and did not hear of any such calls being made to school security officials.

Prosecutor Keeshan also denied feeling pressure from the community, but conceded the killing was "deeply disturbing.' At the time, he said, he had a 14-year-old son who was one year away from attending Conroe High.

Keeshan said he did not join the investigation until several days after the murder. The district attorney said Koerner told him the investigation focused on the two janitors who had discovered the dead girl's almost-nude body in a loft above the school auditorium's stage.

One of the suspects, Koerner told Keeshan, was Brandley, supervisor of the five-man janitorial crew on duty at the time of the murder. Brandley, the only black janitor, also was the only janitor alone at the time the Fergeson girl was reported missing. He also had sent another janitor to the auditorium loft three times to look for the girl, Keeshan recalled.

Brandley, then 28, had worked at Conroe High School for six months and had been a custodial supervisor about one month. He had returned to his hometown in 1979 from Houston, where he had worked since being discharged from the Army and separating from his wife in 1972.

"I was more or less what you would call a compulsive gambler, loved the fast life,' Brandley said recently. "I was in the process of slowing down, getting a place to settle down.'

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During that time, Brandley acknowledged, he paid a municipal fine for assaulting a Conroe woman. He said paying the fine was more expedient than fighting the charge, which he denies.

Keeshan said he focused his attention on Brandley when he learned that his office had prosecuted Brandley in May of 1979 on an illegal weapons charge that stemmed from another woman's allegation of attempted sexual assault.

"I didn't think we were looking for an ordinary criminal,' Keeshan said. "Because of the nature of the crime, I thought we were looking for someone who had definite problems in his relationships with women.'

The flaw in the prosecutor's hunch was a police-administered polygraph examination of Brandley in which the operator concluded Brandley was truthful when he denied the attack on Miss Fergeson.

But when investigators asked the polygraph examiner's supervisor to review Brandley's test, the supervisor concluded the original results had been misinterpreted. Brandley, he said, actually had been deceptive.

A day later, on Friday, Aug. 29, 1980, Brandley was summoned to school Principal Harwell's office and arrested by Conroe police for capital murder.

From the outset, Brandley's defense team believed that the task of defending a black man accused of raping and killing a white girl in Conroe was formidable.

Not unlike a lot of other towns, Conroe had seen its share of racial violence and unrest. In 1923, a black man accused of raping a white woman was burned alive by a mob on the courthouse square. In 1941, as he sat in a courtroom, a black man accused of a similar crime was shot to death by the victim's husband. The husband was acquitted of murder.

Integration of the Conroe school system went peacefully in the early 1970s, but tempers flared in December 1973 when a white police officer fatally shot an 18-year-old black suspect in the city jail, recalled Tom Bacon, managing editor of The Conroe Courier. An all-white jury in a neighboring county later acquitted the police officer of murder charges.

Racism and injustice, according to Mayor Barton and Judge Keeshan, belong in Conroe's past. "You'll find that these days Montgomery County is not that benighted,' Keeshan said.

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But Brandley's old brother, Ozell, contends that racism in Conroe is no less virulent, just less visible.

"To them, you mind your business, you come to work, and you might say, stay in your place. As long as you stay on your side of the fence, they'll speak with you and what not,' Ozell Brandley said.

One area in which the community has not progressed, some black leaders contend, is in the even-handed administration of justice, particularly when it involves crimes committed by blacks against whites.

"If you're black, you've got two strikes against you before you go (on trial),' said N.L. Archie, a former principal at Conroe's previously all-black Booker T. Washington High School.

Rev. Jones, pastor of Pilgrim Rest Baptist Church in Conroe, was even more blunt: "Kill a nigger, they might give you a medal. But kill a white and you might as well start finding a vein (for lethal injection).'

Avoiding all-white juries is especially difficult for black defendants in Conroe because Montgomery County's population of blacks is small, amounting to only about 5 percent, according to the 1980 census.

The 50-member pools from which criminal juries are selected typically include no more than four or five blacks, said District Clerk Peggy Stevens.

Because prosecutors are allowed to strike any 15 prospective jurors, and since they typically use the strikes to exclude all blacks, said defense attorney Ray Reeves, "it's almost impossible to get what I call a fair jury in Montgomery County.'

Nonetheless, Reeves and the rest of Brandley's defense team decided against seeking a change of venue, Brown said, because they feared the trial might be moved to the victim's home county.

By the time jury selection was completed on Dec. 5, 1980, the defense's expectations had been realized -- prosecutors used peremptory challenges to strike all four blacks who qualified as jurors.

After that jury deadlocked on a verdict, the scenario was repeated seven weeks later when a second all-white jury was seated to hear Brandley's case. This time, prosecutors struck the only three qualified blacks.

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Keeshan maintained that his decision to exclude blacks from both juries was based on the bias he believed the jurors might possess. Some knew Brandley or his family, and others knew lead defense attorney George Morris, a former county attorney and Conroe City Council member, Keeshan said.

"Had we found the proper juror,' Keeshan said, "I would have taken a black on the jury.'

Court records show that each of the seven blacks struck by the prosecution had characteristics similar to Brandley -- all were male blue-collar workers, three were in their 20s and none had an education beyond high school level.

But some of the whites selected as jurors shared similarities in age, employment and education with the excluded blacks. One woman on the first jury had a son who had been defended on a murder charge by George Morris.

Black community leaders said they became suspicious of the state's motive the moment the all-white juries were seated.

"I just figured they wanted to pin it on the boy, and if they got an all-white jury on it, they knew it would operate,' said N.L. Archie, the former high school principal.

The absence of witnesses to Cheryl Fergeson's rape and murder dictated that the state's case against Brandley would be circumstantial.

Keeshan relied heavily on testimony from the four janitors working under Brandley's supervision the day of the murder. Three said they had seen Brandley following a blond-haired girl matching Miss Fergeson's description as she entered a restroom; they did not see Brandley again, they said, for 30 to 45 minutes.

The fourth janitor, Henry Martin "Ickie' Peace Jr., was the man who accompanied Brandley on a search for Miss Fergeson after her coach and teammates reported her missing from the gymnasium area.

Peace, a dyslexic whom prosecutors described as mentally retarded, testified that Brandley directed him to search the auditorium loft
three times, becoming more insistent each time.

The third time, with Brandley accompanying him, Peace said he found Miss Fergeson's body beneath a piece of plywood.

Prosecutors also introduced into evidence hair recovered from

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Miss Fergeson's body that experts said was similar to samples taken from Brandley.

The defense in both trials attacked the state's evidence, criticizing police for failing to test a semen sample taken from the victim and for underexposing photographs of the crime scene. Brandley's attorneys insinuated in their questioning of witnesses that the four janitors had been coached and threatened by law officers to incriminate Brandley.

There also was the question, defense attorneys said, of a reddish-brown hair recovered from Miss Fergeson's body that matched neither that of the victim nor Brandley or Peace.

The prosecution argued to the jury that the victim could have picked up the hair from a toilet seat, but the defense contended that the donor had to have been involved in the assault on Miss Fergeson.

Brandley testified at the first trial, but not at the second. He said that during the time he was away from the other janitors, he was in his office smoking a cigarette and listening to the radio.

At the second trial, Keeshan noted that the victim was raped while unconscious or dead and that Brandley once worked at a funeral parlor.

"Whoever did this was not repelled by a dead body,' he said.

The defense countered that Brandley was framed by police to satisfy a public outcry that someone be convicted. Despite those efforts, the defense contended, the state had not proved beyond a reasonable doubt that Brandley was the murderer.

The first jury deliberated for two days before a mistrial was declared. The vote had been 11 to 1 for conviction.

The second jury deliberated about 80 minutes before convicting Brandley and another 55 minutes before concluding that Brandley posed a continuing threat to society and should be executed.

Brandley's supporters contend that racism surfaced during deliberations by both juries. In each case, they said, jurors who had doubts about Brandley's guilt were intimidated into abandoning their position.

Defense attorney Brown also contended that the racial makeup of the jury denied Brandley a presumption of innocence from the start.

"Clarence was black and there was a dead white girl, and he was

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the only one on trial and he was an easy target.'

The juror who deadlocked the first trial -- a white, middle-aged, midlevel manager with an energy company -- confirmed in an interview that he was the target of racial insults from other jurors. He declined to discuss the case further, saying he feared harassment from the community.

The foreman of the first jury, George Branch of Conroe, denied that the holdout was called racial names, but acknowledged that his refusal to change his position made deliberations with the other jurors "quite intense.'

"Basically, he just didn't believe in capital punishment,' Branch said of the holdout. "He should never have been selected as a juror.'

Branch said he and 10 other jurors voted to convict Brandley not because he was black but because all the evidence pointed to his guilt.

"In the absence of an eyewitness, to me, that case couldn't have been more cut-and-dried as far as finding the person that committed the crime,' Branch said.

He said he did not think a lack of blacks on the jury made a difference in deliberations, but noted "had there been a black person on the jury, and he had not voted for conviction, there would have been some prejudice there at that point.'

A member of the second jury echoed Branch's sentiments that the evidence pointed to Brandley and that race played no part in the jury's decision.

"Nobody was under any real pressure," recalled Hillry Truitt of Conroe.

"I take a man for what he is, how he is,' Truitt said. "I don't care what color he is . . . .As far as I am concerned, he (Brandley) was just a man.'

The jury's verdict notwithstanding, the issue of Clarence Brandley's guilt didn't die, not even with his incarceration on death row.

A year after his conviction, Brandley's attorneys discovered that all the exhibits in the trial, including the controversial hairs removed from the victim's body, had been lost by a court employee.

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And last May, a 2. ,ear-old woman told Montgomery County prosecutors that her former common-law husband, a one-time janitor at Conroe High School, confessed to her in August 1980 that he was leaving town because he had "killed a girl at the high school.'

Brenda K. Medina of Cut and Shoot, northeast of Conroe, testified at a court hearing last summer that she had kept silent because she believed her husband was making an excuse about leaving town to avoid paying her child support.

She said she did not realize that Brandley had been sentenced to death until this spring when a neighbor told her.

James Dexter Robinson, 26, Ms. Medina's former husband, denied at a subsequent hearing that he had made any such statement.

And though Robinson insisted he left Conroe in early August, two other janitors testified they had seen Robinson at the high school the morning of Aug. 23, the day Miss Fergeson was killed. They said they had not mentioned it before because they did not think it important.

Also at the hearing, defense attorneys presented testimony from John Henry Sessum, a former high school janitor, who said he had lied at Brandley's first trial about seeing Brandley following a blond girl. Sessum, saying he lied because he was threatened by police, testified in the hearing that he had seen another janitor, Gary Michael Acreman, talking to the girl.

Acreman's former father-in-law, Edward Payne, testified that Acreman had told him the day of the murder that he needed to return to school to retrieve some clothing from a dumpster.

Miss Fergeson's clothing was found in a bag inside a dumpster behind the high school cafeteria two days after her body was discovered.

Payne said he had not revealed Acreman's admission because Keeshan had told him, "I've built my case, and we know who did it.'

"He more or less told me to shut up, so that discouraged me from trying to help,' Payne testified at the hearing.

Keeshan denied he discouraged Payne from testifying.

A former assistant district attorney in Keeshan's office, Frank Robin Jr., testified at the hearings that he saw a report that had implicated Peace in a series of sexual advances in nearby Cleveland, and had showed it to defense attorney Don Brown.

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Keeshan denied kno..ng about the report on Peace. ..: the time of his testimony, Robin, the former prosecutor, was an inmate in the federal prison in Texarkana, serving a sentence for bribery and obstruction of justice.

In late October, state District Judge Lynn Coker concluded that the testimony of Ms. Medina and Robin was not credible and that the defense had failed to prove Keeshan had suppressed evidence. He also ruled that Brandley lacked legal standing to complain about the exclusion of blacks from his jury.

Coker recommended that Brandley's request for a new trial be denied. An execution date for Brandley has not been set, pending the outcome of his appeal before the Texas Court of Criminal Appeals in Austin.

Brandley, meanwhile, says he hopes to be freed, and looks forward to being reunited with his five children.

As Brandley sits in prison, he doesn't deny he is bitter toward the
judicial officials who sent him to death row six years ago.

"When someone is supposed to be in the position to administer justice and see that the type of thing that happened to me doesn't happen, and they themselves are a part of it -- that's the only thing I find real hard,' he said.

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PHOTO (Credit:DMN-Jan Sonnenmair) Racism and injustice, according to State District Judge Jim Keeshan, belong in Conroe's past. "You'll find that these days Montgomery County is not that benighted." ; LOCATION: Judges-Texas.

---- INDEX REFERENCES ----

STORY ORIGIN: CONROE, TEXAS

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Sunday, December 21, 1986

NEWS

HALF OF BLACKS BACK DEATH PENALTY, SURVEY FINDS

Steve McGonigle, Ed Timms

Half the blacks summoned in capital murder juries in Dallas and Houston would vote to impose the death penalty in appropriate cases, but only one in five believes capital punishment is administered fairly.

Two of three blacks summoned in death penalty cases, contacted in a telephone survey by The Dallas Morning News, question the morality and the racial uniformity of capital punishment. Blacks, in their opinion, more often are the targets of capital punishment than whites.

However, only about one third of those questioned said they were against the death penalty under any circumstances.

Three researchers in jury attitudes said The News' survey shows widespread skepticism among blacks toward the death penalty that nonetheless would not disqualify them under Texas law from serving on a capital murder jury.

"Black people fear the death penalty,' said psychologist Robert Gordon. "They're not against it, but they fear the death penalty, that it will be used for improper purposes and as a method of social control, of racial control.'

Despite such reservations, Gordon said, the survey shows that a majority of blacks likely would be conscientious death penalty jurors.

"Psychologically, it's a more honest person,' Gordon said. "It better expresses the human condition than someone who expresses no equivocation, without any amount of moral ambivalence.'

Gordon, psychologist Leon Peek and Frank Williams, a criminologist at Sam Houston State University in Huntsville, said The News' survey is consistent with similar studies they have conducted.

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Those studies sho[w] [t]hat six of 10 blacks surveyed favor the death penalty, compared to eight out of 10 whites who expressed support. A 1985 nationwide Media General-Associated Press poll showed 84 percent of Americans support capital punishment.

The News' survey was conducted Dec. 2-9 and included telephone interviews with 210 blacks summoned for 84 capital murder juries during the past 10 years. The analysis of those interviews was done by The News' market research department. Sixty percent of the respondents lived in Dallas County. Fifty-three percent were women, 73 percent were aged 25 to 64 and one percent was unemployed.

Fifty-three percent of the respondents said they were opposed or strongly opposed to the death penalty. Seventeen percent were neutral. Twenty-eight percent said they favored or strongly favored capital punishment.

The two most common reasons cited in their opposition to the death penalty were personal and religious beliefs, which were voiced by a total of 56 percent of the anti-death penalty respondents.

Many death-penalty opponents said they did not believe in retribution or taking responsibility for deciding a fellow human being's fate.

"There is only one judge, and that is God,' said Berneice Mims, a 48-year-old Houston homemaker. "I don't have the right to take someone's life. That makes me as bad as he is.'

Others said they worried about making irrevocable mistakes.

"There are so many crooked things going on today, like they find someone guilty in a shadow of a doubt, and a year later they are not guilty, and they could have been dead,' said Dallas truck driver C.W. Jones.

Among those who favored the death penalty, 30 percent said certain crimes warrant capital punishment. An additional 22 percent cited the deterrent effect of the death penalty as the basis for their support.

"I think you do not turn people loose who have a desire to kill. Putting someone in jail for a murder is not a deterrent to crime. I would not turn a mad dog loose on the street,' said Houston postal worker Elmo Garrett, 53, one of 12 jurors who sent Anthony Ray Westley to death row.

Many other people said they believed in the concept of the death penalty but do not support the seemingly arbitrary manner in which it

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is applied.

"They do some, and some they don't. If they executed everybody it would be different. It's an unfair system the way it's done,' Gloria Dunn Thompson, a Dallas homemaker.

James Belt, a Dallas lawyer, said his objection to capital punishment is the justice system's apparent color-consciousness.

---- INDEX REFERENCES ----

EDITION: HOME FINAL

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STATE ~~Excused~~ ~~Agreement~~

PLEASE PRINT ALL ORMATION

JUROR NUMBER: 28

1. NAME: Warren (LAST) Joe (FIRST) Alfred (MIDDLE) (MAIDEN (If applicable)

ADDRESS: 4123 Telstar TOWN: Dallas

HOME PHONE: 337-5591 WORK PHONE: 330-0321

EMPLOYER: Kroger Food Stores NAME OF SUPERVISOR: George Parmer

MARITAL STATUS: (Circle one) Single/Married/Divorced/Widowed/Separated

AGE: 45 DATE OF BIRTH: 8-16-40 PLACE OF BIRTH: Linden

OCCUPATION: Market Manager

SPOUSE'S NAME: Dorothy Warren DATE OF BIRTH: 9/21/

Please give the following information as to each of your children: Name, Sex, Age, Date of Birth, Marital Status, Occupation, Present place of residence:

DeShaunda Clark. Female 24 yrs old 10/15/61 Married Housewife Flowermound
Benny Warren. Male 18 yrs old Born 8/9/67 Single Student. My Ho
Joe Warren Jr. Male 17 yrs old Born 12/16/68 Single Student. My H

2. Please list any place other than Dallas County where you have PREVIOUSL RESIDED:

Marietta Texas

3. Are you a member of a local church, temple, or religious organization? If so what is its name and location?

Salem Baptist Church. Dallas Texas

ATTENDANCE (circle one):

a. more than once a week
b. every week
c. frequently
d. occasionally
e. rarely
f. never

4. What activities, if any, other than attendance, are you involved with a your present church, temple or religious organization?

None

5. Do you watch or listen to any religious programming?

a. more than once a week
b. every week
c. frequently
d. occasionally
e. rarely
f. never

6. ' you a member or financial suppor of any media church? (700 Clu Oral arts, etc.) (yes) (no)

7. Have you ever studied for the ministry, or held similar church respons bilities?

no

8. What civic clubs, societies, unions, professional associations or other organizations have you been in and are you a member of?

Local 540 Meat Cutters Union

9. What offices are you holding, or have you held in the past, in these organizations?

None

10. What are your hobbies, favorite recreations, pastimes and spare time activities?

Fishing, Gardening, Sofeball

11. Do you subscribe to and regularly read a newspaper? (yes) (no)

If yes, state name of newspapers. Dallas Times Herald

12. What is your favorite movie? Moses

13. What is your favorite TV show? Cosby Show

14. What was the last book that you read? One Minute Manager

15. Have you ever read a book about a murder trial? (yes) (no)

16. What is your favorite radio station? KKDA 104

17. Do you subscribe to or regularly read any magazine(s)? (yes) (no)
If so, which magazine(s)?

18. Do you or have you displayed a bumper sticker on your personal or famil car? (yes) (no)
If your answer is "yes", please state the message on the sticker(s):
Dallas Cowboys + If You Can Read This You Are To Close

19. Have you ever owned personalized license plates? (yes) (no)
If your answer is "yes", please state the message on the license plate(s):

20. What is the highest grade you completed in school? If you did not complete high school, do you have a GED?

12th Grade

21. If you attended college, what was your (a) major subject: (b) minor subject: (c) name of college: (d) location of college: (e) did you graduate?

No College

22. Please describe any vocational or educational courses you may have attended: Meat Training Courses also Management Training Course

23. If you were in the service: What branch: Army

Did you volunteer or enlist: Volunteer Re-enlist: No

Highe ank or grade attained: Privat

Duties.

In combat: None

24. Have you ever held or sought political office: No

If yes, what office held:

Sought: When held or sought:

25. Are you, your spouse, or any member of your family presently or have yo they in the past been a member, volunteer, or an employee of a law enforceme organization such as a city, county, state, or federal policeman, constable, deputy sheriff, Texas Ranger, Texas Department of Public Safety officer, etc (yes) (no)

If YES, please state the following: Position and date held:

Brother Was on police force in New Jersey

26. Are you, your spouse, or any member of your family presently or have yo or they in the past been a member of an auxiliary or police reserve law enforcement branch such as an auxiliary deputy sheriff or constable? (yes) (no)

If YES, please state the following: Position and date held:

27. Have you, your spouse, or any member of your family ever served as a military policeman? (yes) (no)
If YES, position, branch of service, dates held:

28. Have you, your spouse, or any member of your family applied for a job i law enforcement but subsequently decided not to take the job? (yes) (no)
If YES, what law enforcement position applied for, approximate date of appli cation:

29. Have you, your spouse, or any member of your family ever worked as a secretary, clerk, filing assistant, dispatcher, or backup employee of any la enforcement agency? (yes) (no)
If YES, please give details including the name of the agency and specific ta that you or they performed, along with dates of employment.

30. Have you, your spouse, or any member of your family ever worked in a prison, jail, or detention center of any sort? (yes) (no)
If YES, please give the name of institution, type of institution, dates and position held.

31. Have you, your spouse, or any member of your family ever worked as a security guard or for a detective service? (yes) (no)
If YES, please give the name of business, dates and position held. Security Guard
My Brother About 4yrs AGC Guaranty Bank

32. Do you have any close friends who are employed in law enforcement? (yes) (no)
If YES, please state the names of those friends and the law enforcement agenc by which they are employed.

33. Have you, your spouse, or any member of your family ever been in any way connected with the District Attorney's Office of this or any county? (yes) (no)
If YES, please give what county, position held, dates held.

34. Have you, your spouse, or any family ... per ever had occasion to use th servic... f the District Attorney's Office ... any hot checks or complaints c miscel... ous matters before? (yes) (no)
If YES, please explain:

35. Have you, your spouse, or any member of your family or close friend eve studied law? (yes) (no)
If YES, give details:

36. Have you, your spouse, any member of your family or close friend ever studied, (a) psychology; (b) sociology; or (c) criminology? (yes) (no)
If YES, give details:

37. Do you have any prejudice for, against, or fixed opinions concerning psychiatric or psychological testimony? (yes) (no)

38. Have you ever heard of an individual named Douglas Walker? (yes) (no)

39. Have you ever heard of an individual named Donald Ray Hall? (yes) (no)

40. Have you ever heard of an individual named Thomas Joe Miller-El, the defendant? (yes) (no)

41. If either you or your spouse were in the armed forces, did either of you ever serve on a court martial? (yes) (no)
If YES, please explain:

42. Have you ever had a pleasant or an unpleasant experience involving law enforcement? (yes) (no)
If YES, please explain:

My Son was Involved in Am shop a School we had Attend Some Meetings

43. Please state your and yours spouse's present occupation. How long have you worked in this capacity?

Market Manager 19 Years

SPOUSE: Operator 19 Years

44. What are your and your spouse's present duties in regards to your presen occupation?

Same As About

SPOUSE: Same As Above

45. Other than your and your spouse's present occupation, what other types c jobs have you and your spouse held?

Taxi Driver Bartender

SPOUSE: Waitress

46. Have you ever been interested in any criminal case in Dallas County, Texas? (yes) (no)
If YES, what case and what was your interest? (Such interest could have been through a friend, relative, or generally through T.V., newspaper, or other similar media.)

Some times I see Certain cases on TV may Interest Me Per 3 ...

47. H... you, your spouse, member of your ...ediate family, or close friend or rel... e ever been a victim of a crime. (yes) (no)
If YES, where, when and what type of crime?

[illegible]

48. If you were a victim of a crime, was anyone charged with the offense against you? (yes) (no)
If YES, was that person prosecuted in court and what was the result?

49. Have you ever been a witness in a criminal case? (yes) (no)
If YES, explain whether you testified in court and were you a witness for the prosecution or the defense.

50. Have you, your spouse, or close friend or relative, ever been charged, arrested, indicted, or convicted of any criminal offense? (yes) (no)
If YES, please give dates and explain.

The ONE Stated Above

51. Have you served as a juror before? (yes) (no)
YES, what kind of case was it and what dates?

A Grand Juror? (yes) (no)
If YES, please give dates and details.

52. If you have served on a criminal jury, were you able to reach a decision on guilt or innocence? (yes) (no)
If YES, did the jury or the judge decide the punishment?

After your criminal jury service, were you talked to or contacted by:

	Judge	(yes)	(no)
b.	District Attorney's Office	(yes)	(no)
c.	Defense Lawyer	(yes)	(no)
d.	Any other party or person	(yes)	(no)

53. If you have served on a jury, was there anything in your prior jury experience that either upset or agitated you to the extent that such jury service was an unsatisfactory experience? (yes) (no)
If YES, please explain.

54. Have you done volunteer work? (yes) (no)
If YES, for what organization?

School PTA

55. Have you ever been associated with any program or organization involved with the prevention of crime, or the apprehension or punishment of offenders? (examples: Crime Stoppers, MADD, etc.) (yes) (no)
If YES, what organization?

Crime Stoppers

56. Do you believe in the death penalty? (yes) (no)
Please explain your answer.

In Some Cases Yes

57. Do you have any moral, religious, or personal beliefs that would prevent you from sitting in judgment on another human being? (yes) (no)

58. Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution another human being? (yes) (no)

59. Do you know of reasons why you could not sit as a juror in this case and be absolutely fair to both the Defendant and the State, and render a verdict based solely upon the evidence presented to you? (yes) (no)

60. Do you know any of the following persons?

Donald Ray Hall	(yes)	(no)
Mohamed Ali Karimijoji	(yes)	(no)
Anthony Phillip Motari	(yes)	(no)
Monroe Johnson	(yes)	(no)
Donald Bruce	(yes)	(no)
Robert Earl Wilson	(yes)	(no)
Stanley James January	(yes)	(no)
Michael Wayne Johnson	(yes)	(no)
Graeme P. Dowling, M.D.	(yes)	(no)
Patrick Besant-Mathews, M.D.	(yes)	(no)
Charles S. Petty, M.D.	(yes)	(no)
H. G. F. Gilliland, M.D.	(yes)	(no)
K. L. Pollard	(yes)	(no)
J. Perez	(yes)	(no)
J. L. Gentry	(yes)	(no)
C. E. Moore	(yes)	(no)
J. Reed	(yes)	(no)
B. Papke	(yes)	(no)
C. G. Cheek	(yes)	(no)
J. L. Alford	(yes)	(no)
D. McIntosh	(yes)	(no)
M. R. Yeakley	(yes)	(no)
R. Cagle	(yes)	(no)
M. Collins	(yes)	(no)
J. Hallum	(yes)	(no)

Some Cases Yes / Some Cases No
There Are Some Cases DP
Things Happen / that Could Have Been Avoided.
Choice - Went Armed + Did It
Self Defense - No
Accomplish Something - Yes + No
Crim. Background
Background
Cases I Wouldn't To Be Personally Involved.

T. Bulo[illegible]	(yes)	(no)
M. Fo[illegible]	(yes)	(no)
D. Hootman	(yes)	(no)
Richard Gilmette	(yes)	(no)
K. K. Kirby	(yes)	(no)
D. B. Osterberg	(yes)	(no)
C. L. Williams	(yes)	(no)
J. D. Heard	(yes)	(no)
[illegible]. E. David	(yes)	(no)
B. Robertson	(yes)	(no)
C. E. Anderson	(yes)	(no)
G. H. Reyes	(yes)	(no)
Kennard Sonny Flowers, Jr.	(yes)	(no)
Johnny Allen McDowell	(yes)	(no)
[illegible]wanna Bey Bonner	(yes)	(no)
Johnny Bonds	(yes)	(no)
Dave Ferguson	(yes)	(no)
Phillip Bond	(yes)	(no)
G. L. Burke	(yes)	(no)
Larry Fletcher	(yes)	(no)
Mary C. Eppes	(yes)	(no)
James P. Grigson, M.D.	(yes)	(no)
[illegible]lay Griffith, M.D.	(yes)	(no)
Tom Hupp	(yes)	(no)
David G. Eldridge	(yes)	(no)
James Mathews	(yes)	(no)
John Milani, M.D.	(yes)	(no)
[illegible]raig Harrison, M.D.	(yes)	(no)
Joel Budge	(yes)	(no)
Grady Tucker	(yes)	(no)
J. G. Cron	(yes)	(no)
Lynn Lyonn	(yes)	(no)
Jimmy Wooten	(yes)	(no)
D. J. Crane	(yes)	(no)

Richard Terrier (yes) (no)

Lori [illegible] (yes) (no)

Rodney Phillips (yes) (no)

Bob Clepper (yes) (no)

George M. Taylor (yes) (no)

ORIGINAL

No. 01-7602

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
DEC 11 2001
OFFICE OF THE CLERK

October Term, 2001

THOMAS JOE MILLER-EL,

Petitioner,

v.

JANIE COCKRELL,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

CERTIFICATE OF SERVICE

I, Jim Marcus, hereby certify that a true and correct copy of Petitioner's Motion to Proceed *In Forma Pauperis* was served on counsel for Respondent on this 11th day of December 2001, via First Class United States Mail, addressed to:

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Jim Marcus
Counsel of Record

ORIGINAL

Supreme Court, U.S.
FILED
JAN 16 2002
CLERK

No. 01-7662

In The
Supreme Court of The United States

THOMAS JOE MILLER-EL,
Petitioner,

v.

JANIE COCKRELL, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent.

On Petition For Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

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SUPREME COURT, U.S.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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101 pp

QUESTIONS PRESENTED

1. Under *Batson's* third step, is a state judge required to apply a shifting degree of scrutiny dependant on the strength of the *prima facie* showing to determine whether a prosecutor's peremptory strikes are credible?

2. On state habeas review, is a court's competency determination based on supplemental briefing, expert affidavit testimony, and personal recollection from trial unreasonable under 28 U.S.C. § 2254(d)(2) because it did not hold a "live" hearing?

3. Under 28 U.S.C. §§ 2254(d)(2) & (e)(1), is it logically consistent for a state court factual determination to be unreasonable when the sole fact at issue is correct?

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A. The record reflects that Miller-El was competent in fact at the time of his trial. 20

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Sup. Ct. R. 10 7

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Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds*, DALLAS MORNING NEWS, March 9, 1986 4

PRELIMINARY STATEMENT

Thomas Joe Miller-El is a Texas death-sentenced inmate seeking a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit denying Miller-El habeas relief. Miller-El is scheduled to be executed on February 21, 2002. In his petition for certiorari, Miller-El presents four questions that essentially relate to two distinct underlying constitutional claims—(1) a *Batson*[1] challenge and (2) a disputed competency determination. On a procedural level, Miller-El also challenges the Fifth Circuit Court of Appeals' treatment of 28 U.S.C. §§ 2254(d)(2) & (e)(1) as it relates to both of his substantive claims.

Regarding the *Batson* claim, Miller-El complains that the trial court did not give enough weight to his prima facie evidence when making its credibility determination at *Batson's* third step. Specifically, Miller-El alleges that *Batson's* third step requires a trial court to measure a prosecution's credibility using a sliding scale that changes dependent on the relative strength of the prima facie showing of step one. *See* Pet. for Cert. at 25 ("The strength of the *prima facie* case helps determine the level of scrutiny to be applied to the proffered race-neutral reasons. Thus, an actor who stands indicted by a particularly formidable *prima facie* case will face greater scrutiny during the third, determinative stage, at which a court will weigh the totality of the evidence."). Notwithstanding Miller-El's normative argument, certiorari must be denied on this claim because neither *Batson*, nor any other controlling precedent, imposes any kind of scaled scrutiny to be applied at *Batson's*

---

[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

third step.

Regarding Miller-El's underlying competency claim, Miller-El alleges that the state habeas court utilized an unreasonable process to determine that Miller-El was competent at the time of his trial. Certiorari must be denied on this claim because the record plainly speaks for itself regarding the reasonableness of the state habeas court's review, as well as the reasonableness of every reviewing court since.

Regarding the Fifth Circuit's application of 28 U.S.C. §§ 2254(d)(2) & (e)(1), the court below held that Miller-El failed to present clear and convincing evidence to establish that the state court decision was unreasonable. This construction was not only proper in this case, but logically mandated, since there was only one question of fact at issue in each underlying substantive claim. It is not possible for a fact to be correct, yet unreasonable.

STATEMENT OF THE CASE

I. Facts of the Crime.

Miller-El's wife, who was an employee at the Holiday Inn South in Irving, Texas arranged for a meeting of the Moorish Science Temple Feast at the hotel on November 8-10, 1985, that Miller-El attended as a participant. Miller-El, his wife, and an accomplice returned to the hotel shortly before midnight on November 15 on the pretense of picking up his wife's paycheck. While there, Miller-El, who was armed with a semi-automatic "tech" nine millimeter machine gun with a flash suppressor for night use; and his accomplice, who was also armed, forced a hotel employee Donald Hall to empty the cash drawer and then

ordered Hall to bring any other people from the back to the front. Doug Walker, another employee, then came out, and the two employees were led to a bellman's closet and forced to open it. Once Miller-El and his accomplice removed all of the valuables from the closet and took Walker's and Hall's wallets, Miller-El tied Walker's hands behind his back, tied his legs together, and gagged him with strips of fabric. The accomplice did the same to Hall. Walker was laid on his face and Hall was laid on his side. Miller-El then stood at Walker's feet, removed his glasses and then shot Walker in the back two times. Hall closed his eyes after the first shot. He heard two more shots and realized that he had also been wounded. Hall tried to talk to Walker but only heard him choking. When he heard familiar voices outside, Hall screamed for help.

Miller-El fled to Houston, where authorities were advised that Miller-El was wanted on a murder warrant in Irving. Based on that information, Houston authorities went to the residence of Miller-El's Houston acquaintance to arrest Miller-El. While there, Miller-El and his acquaintance arrived in a car and noticed approaching law officers. In his attempt to escape, Miller-El was shot by an officer when he jumped from the vehicle brandishing a gun.

II. Facts Relating to the Issues Presented for Review.[2]

A. The *Batson* Issue.

Jury selection for Miller-El's capital murder trial began on February 3, 1986 and

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[2] This section is drafted liberally from the detailed Findings and Recommendations of the United States Magistrate Judge, pp. 6-9.

continued through March 5, 1986. The original venire consisted of 108 prospective jurors, including eighteen African-Americans. Six of the African-American jurors were excused by agreement of the parties and one was struck for cause. Both sides were then allowed fifteen peremptory challenges. The prosecution used ten strikes against African-Americans. The defense exercised all fifteen of its challenges against non-minorities. One African-American was seated on the jury.

On March 9, 1986—just four days after the jury was empaneled—The *Dallas Morning News* ran a front-page story about jury selection practices in Dallas County criminal cases. *See* Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds*, DALLAS MORNING NEWS, March 9, 1986 at A1. This article prompted defense counsel to file a motion to quash the jury panel. The trial court held a hearing on the motion on March 12, 1986. Testifying at the hearing were five current or former judges, two prosecutors, and two defense lawyers, who testified regarding historic discriminatory practices dating from the 1950s.

At the conclusion of the hearing, the trial judge found that there was no evidence presented that indicated any systematic exclusion of blacks as a matter of policy by the District Attorney's office and that Miller-El had failed to establish a *Swain*[3] violation. The case proceeded to trial and Miller-El was convicted of capital murder on March 26, 1986. One month later, the Supreme Court decided *Batson*.

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[3] *Swain v. Alabama*, 380 U.S. 202 (1965).

On direct appeal, Miller-El challenged his jury selection under the *Batson* standard. The Texas Court of Criminal Appeals found that Miller-El had established a prima facie claim under *Batson's* first step based on the disproportional number of blacks that were stricken at voir dire. *Miller-El v. State*, 748 S.W.2d 459, 460 (Tex. Crim. App. 1988). The case was remanded to the trial court with instructions to conduct a *Batson* hearing. *Id.* at 460-61.

On remand, the *Batson* hearing was held on May 10, 1988. Paul Macaluso, the prosecutor who conducted voir dire, testified as to his reasons for striking each of the *Batson* jurors from the jury panel. The trial court determined that these explanations were race-neutral and negated any inference of purposeful discrimination. Specifically, the court found that: (1) none of the explanations given by the prosecutor were based on group traits; (2) none of the jurors were questioned perfunctorily; (3) there was no disparate examination of the jurors; and (4) the primary reason given to support each peremptory challenge, the juror's reluctance to assess the death penalty, was closely and directly related to the facts of the case.

Miller-El challenged these findings on direct appeal. The Texas Court of Criminal Appeals, after independently reviewing the voir dire and the supplemental record, found that the record contained "ample support" for the prosecutor's racially neutral reasons and concluded that the prosecutor's explanations were not "patently implausible or so contrary to the evidence as to be unworthy of belief as a matter of law." *Miller-El v. State*, No.

69,677, slip op. at 2 (Tex. Crim. App. September 16, 1992).

B. The state habeas competency determination.

Despite raising thirty-six points of error on direct appeal, it was not until nearly nine years after his trial, in his state habeas application, that Miller-El first raised his claim that he was mentally incompetent to stand trial due to his physical injuries.

Miller-El's trial was held eight weeks after he was shot by Houston police officers incident to his arrest. Miller-El sustained serious abdominal injuries and was taken to the hospital for treatment. Surgeons removed part of his intestines, repaired damage to his internal organs, and performed a double-barreled colostomy. He was hospitalized for eight weeks and was eventually discharged to the custody of Harris County officials on January 12, 1986. Four days later, Miller-El arrived at the Dallas County Jail. Miller-El continued his treatment with a variety of medications and was placed on a double portion diet to regain weight. A wheelchair was ordered so he could go to court, however, Miller-El no longer needed a wheelchair by the time jury selection began on February 3, 1986.

On three separate occasions during his trial, Miller-El underwent medical evaluations at the direction of the trial court. First, during jury selection, Miller-El experienced chest pain, chills, and fever, prompting the judge to order a medical evaluation. Miller-El was diagnosed with pneumonia, treated with Darvocet and Erythromycin, and discharged the same day. Nine days later, while jury selection was still on-going, after Miller-El reported delays in the receipt of his medication, "the trial judge asked the jail doctor to determine

whether petitioner needed more pain medication for his 'well-being.'" The jail doctor determined that he did not. *See* Findings and Recommendations of the United States Magistrate Judge, p. 29. Then, two days before jury selection concluded, Miller-El was taken to the hospital for treatment of a chest abscess. Once his trial began, Miller-El complained about soreness around his rib cage and asked to see a doctor, which is noted on his medical chart. Finally, on the evening of the day Miller-El was found guilty in the first phase of his trial, the trial judge ordered a medical evaluation to determine whether Miller-El was able to sit through court after Miller-El complained about nausea and a problem with his colostomy bag. Findings, p. 32. Miller-El was kept overnight at the hospital for treatment for a small bowel obstruction. The next day, he was released from the hospital and the punishment phase of his trial began.

ARGUMENT

I. The Questions Presented For Review Are Unworthy of The Court's Attention.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are compelling reasons therefor. Miller-El advances no compelling reason in this case and none exists. Further, the issues in this case involve only the application of established constitutional principles to the facts. Thus, the petition presents no important question of law to justify this court's exercise of its certiorari jurisdiction. To the extent that Miller-El attempts to add a shifting scrutiny requirement to *Batson's* third step, he is barred under

Teague v. Lane, 489 U.S. 288 (1989).

As a threshold matter, AEDPA's standard of review applies to Miller-El's petition. Under AEDPA, a federal court may grant habeas relief only if the state court proceedings

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1) & (2).

Section 2254(d) distinguishes between two types of erroneous decisions–those of law and those of fact. Claims of factual error are subject to the standard enunciated in section 2254(d)(2). State court findings of fact are presumed correct and may be overturned only if shown to be incorrect by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Both of the underlying substantive issues Miller-El challenges here involve outcome-determinative findings of fact.

II. The Trial Court's Credibility Determination That *Batson* Was Not Violated is Supported By The Record And Is Thus Not Clearly Erroneous; As Such, It is Reasonable and Entitled to Deference.

Miller-El claims that the State exercised its peremptory challenges during jury selection in a racially discriminatory fashion in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). Specifically, Miller-El complains that the trial court did not give enough weight to his *prima facie* evidence when assessing whether the prosecution's peremptory justifications were credible. But, because probative evidence supports the trial court's

detailed conclusions that the prosecutor's strikes were credible, they cannot be found to be clearly erroneous, nor can they be found to be unreasonable, and as such, they are entitled to deference by this Court.

Batson sets forth a three-step evidentiary framework for evaluating claims of racial discrimination in jury selection. *See id.* at 93-98. First, the defendant must make out a *prima facie* case that the prosecutor has exercised peremptory challenges in a racially discriminatory manner. *See id.* at 96-97. Second, if the defendant has made a *prima facie* showing, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Id.* at 97. "[T]he prosecutor must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenges." *Id.* at 98 n. 20. Yet the explanation "need not rise to the level justifying exercise of a challenge for cause." *Id.* at 97. In fact, "[t]he second step of this process does not demand an explanation that is persuasive, or even plausible." *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995). "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* at 768. Third, if the prosecutor has articulated "a neutral explanation related to the particular case to be tried," the trial court then has "the duty to determine if the defendant has established purposeful discrimination." *Batson*, 476 U.S. at 98. The defendant at all times bears the ultimate burden of persuasion as to the existence of purposeful discrimination. *Purkett*, 514 U.S. at 768.

A. The trial court properly applied *Batson's* third step.

In this case, there is no dispute that Miller-El presented a *prima facie* claim under *Batson's* first step. Nor is there a dispute that the prosecution presented facially neutral reasons to justify each peremptory strike. Solely at issue is Miller-El's disagreement with the trial court's ultimate determination at *Batson's* third step, finding that the prosecution's reasons were credible and that *Batson* was not violated.

A state court finding under step three of *Batson* is a determination of fact. *See Hernandez v. New York*, 500 U.S. 352, 365-66 (1991). On review, the state court's finding is presumed correct unless Miller-El rebuts that presumption with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). "[W]here there are two permissible views of the evidence, the factfinder's choice between them cannot by clearly erroneous." *Hernandez*, 500 U.S. at 369. In reviewing a state trial court's finding on the issue of discriminatory intent, federal courts should not conduct "independent appellate review," and must "accord[] great deference . . ." to the state findings. *Hernandez*, 500 U.S. at 364. As *Hernandez* makes clear,

> [W]e decline to overturn the state trial court's finding on the issue of discriminatory intent unless convinced that its determination was clearly erroneous. It "would pervert the concept of federalism," to conduct a more searching review of findings made in state trial court than we conduct with respect to federal district court findings.

Id. at 369 (internal citations omitted).

The record abundantly supports the reasonableness and correctness of the trial court's determination as evidenced throughout Miller-El's state court proceedings, including voir dire, the post-voir dire *Swain* hearing, the *Batson* hearing on remand, and the direct appeal opinion. First, even though *Batson* had not been decided at the time of voir dire, the prosecution offered explanations on the record immediately following each peremptory strike. The fact that these reasons were given immediately following each juror's voir dire adds credibility to the trial court's ultimate determination since the trial court was able to immediately assess first-hand the genuineness and sincerity of the prosecution's peremptory strikes in light of the immediately preceding voir dire, particularly the demeanor of the potential jurors and the attorneys for both sides. The fact that *Batson* had not yet been decided is significant and supports the prosecution's credibility because the prosecution's stated reasons obviously were not offered as a pretextual way to circumvent *Batson's* dictates.

Second, despite finding no *Swain* violation following the trial court's extensive post-voir dire hearing, the trial court held a *Batson* hearing upon remand from the Court of Criminal Appeals to give effect to the change in the evidentiary formulations from *Swain* to *Batson*.[4] There, the trial court went through each successive *Batson* step, following existing Supreme Court directive to the letter. After the hearing, the trial court issued

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[4] A transcript of the entire *Batson* remand hearing is attached as Appendix A. It is evident from the transcript that the trial court conscientiously applied each step of *Batson* and considered all of the evidence presented in making its ultimate determination.

findings of fact detailing its conclusions. The detailed, written factual findings of the trial court demonstrate that each challenged black juror was stricken on race-neutral grounds. The trial court found:

> At the time of the trial in this case, this court was convinced that none of the State's peremptory challenges were made for race-related reasons. The court remains convinced that this is true, and holds that the evidence did not even raise an inference of racial motivation in the use of the State's peremptory challenges. While it is true that the State used 10 of its 14 peremptory challenges against black veniremen, it is also true that one black venireman did serve on the jury. However, such raw numbers, while instructive, are not the sole basis for this court's holding. . . .
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> . . . .
>
> . . . [T]he Court makes the following Findings of Fact and Conclusions of Law:
>
> 1. The Court finds that the prosecutor came forward with a neutral explanation for each of the State's peremptory challenges of a venireman of the Defendant's race.
>
> 2. The Court finds that the explanations given by the prosecutor in each case were completely credible.
>
> 3. The Court finds that the explanations given by the prosecutor as to each venireman were completely sufficient as to content.
>
> 4. The Court finds that none of the explanations given by the prosecutor were based on a group trait which was not given to apply to the challenged veniremen specifically.
>
> 5. The Court finds that none of the veniremen in question were examined only perfunctorily by the prosecutors.
>
> 6. The Court finds that no disparate prosecutorial examination of any of the veniremen in question has been shown.

> 7. The Court finds that the primary reasons for the exercise of the challenges against each of the veniremen in question, their reluctance to assess or reservations concerning the imposition of the death penalty, were closely and directly related to the facts of the case, insofar as this was a death penalty case.
>
> 8. The Court finds the other factors cited by the prosecutors were reasonably related to the facts of the case.
>
> 9. The Court finds that there has been no showing by the Defendant of disparate treatment by the prosecutor of the black veniremen in question versus non-black veniremen, where there was a difference between the responses given by veniremen who were and who were not challenged by the State.
>
> 10. The Court finds that there was no purposeful discrimination by the prosecutor in the use of his peremptory strikes.

1 Supp. Tr. 4-7.

Miller-El fails to present clear and convincing evidence to the contrary, and this Court should deny certiorari review.

B. *Batson* does not require the trial court to apply different levels of scrutiny in step three when considering the prosecutor's peremptory strike justifications.

Miller-El alleges that step three requires a trial court to apply shifting levels of scrutiny when making its credibility determination. Specifically, he argues, "The strength of the *prima facie* case helps determine the level of scrutiny to be applied to the proffered race-neutral reasons. Thus, an actor who stands indicted by a particularly formidable *prima facie* case will face greater scrutiny during the third, determinative stage, at which a court will weigh the totality of the evidence." Pet. for Cert. at 25. To the contrary, Supreme Court law requires nothing of the kind. To that extent, Miller-El's extension of *Batson* is barred

by *Teague v. Lane*, 489 U.S. 288.

As Chief Judge Becker of the Third Circuit Court of Appeals recently noted in a case discussing *Batson's* third step:

> [S]tep three is neither conceptually difficult nor procedurally complicated. Step three simply requires the judge to make a finding of fact—"to determine if the defendant has established purposeful discrimination," *Batson*, 476 U.S. at 98 (footnote omitted). See also *Purkett*, 514 U.S. at 767; *Hernandez*, 500 U.S. at 358-59 (plurality opinion); *id.* at 375 (O'Connor, J., concurring in judgment). Neither Batson nor any subsequent Supreme Court or Third Circuit case has added to this requirement.

Riley v. Taylor, ___ F.3d ___, 2001 WL 1661489 at *49 (3rd Cir. Dec. 28, 2001) (Becker, C.J., concurring in the judgment, but disagreeing with majority *Batson* holding).

In *Riley*, as Miller-El does here, the majority took issue with the fact that the trial court did not comment on the record regarding evidence that on review seemingly undermined the prosecution's proffered explanations for the disputed peremptory strikes. *See id.* at *15-23. The court there held that because the state court did not discuss on the record the evidence that the defense offered to rebut the prosecution's race-neutral peremptories, and because there was nothing else relevant in the record to support the state courts' decision finding the prosecution's explanations credible, Riley was entitled to *Batson* relief. The *Riley* court essentially imposed a "totality of the circumstances" weighing requirement at step three that specifically must be documented on the record.

Without agreeing with the majority conclusion, *Riley* is distinguishable from Miller-El's case for several reasons. First, and importantly, *Riley* was decided under the pre-

AEDPA standard of review. *Id.* at *17. Second, unlike Riley's rebuttal evidence, Miller-El's *prima facie* evidence does little to detract from the State's peremptory justifications that are abundantly documented in the record. Instead, his *prima facie* case consists primarily of historic data—compiled by newspaper reporters—dating back to the 1950's that, while useful in a *Swain* context, utterly fail to negate the prosecution's peremptories in his particular case. As the federal magistrate noted, "Historical evidence is of limited value in assessing whether the race-neutral explanations articulated by the prosecutor were a pretext for discrimination *in this case*." Findings and Recommendation at 13. His other *prima facie* evidence consists of patchwork veniremember comparisons using snippets of voir dire testimony[5], minimum-punishment voir dire testimony used by both the prosecution and the defense, and permissible jury shuffles, none of which formed the actual bases of, or serve to negate the prosecutions strikes, but merely serve as discriminatory innuendo in establishing his *prima facie* claim. Third, the prosecution's race-neutral justifications here are more detailed and explanative than those in *Riley*; hence, more credible.

As Chief Judge Becker noted in *Riley* that is entirely applicable here:

> I do not question that a judge, in making the factual finding required by step three of Batson, should consider all of the relevant evidence that has been adduced. But neither Batson nor any later Supreme Court . . . case suggests that a federal habeas court is free to reject the factual findings of a state court if the state court does not comment on all of the evidence or provide what the federal court regards as a satisfactory explanation for its finding. . . .

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[5] *See* Appendix B (discussing individual voir dire of each *Batson* veniremember and the prosecution's reasons for striking them in the context of Miller-El's challenges.)

. . . .

> . . . The majority confuses the obligation to consider all of the relevant evidence (something that a court should always do in making findings of fact) with the obligation to comment on all of the evidence (an obligation that we are not free to impose on state courts).
>
> In this case, as I have noted, there is no question that the state courts did precisely what step three of Batson required—they made findings as to whether Riley had established purposeful discrimination. And they did so only after discovery and a thorough hearing. There is no reason to believe that the state courts did not consider all of the relevant evidence, including all of the evidence that the majority now finds persuasive.

Riley, 2001 WL 1661489 at *50 (footnotes omitted).

Miller-El takes the majority holding in *Riley* a step further by not only requiring the state judge to consider the totality of the circumstances on the record, but further requiring the state judge to apply specific measures of scrutiny based on the *prima facie* claim in making its credibility determination. As Chief Judge Becker in *Riley* made clear, this is not the law, nor should it be.

The cases Miller-El cites either do not support his proposition or are non-controlling.[6] For example, Miller-El relies on a statement this Court made in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), an age discrimination case that

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[6] Miller-El cites to other non-controlling cases that don't particularly support his position, or that use different standards of review, whether federal, pre-AEDPA, or both. *See e.g., Coulter v. Gilmore*, 155 F.3d 912 (7th Cir. 1998) (pre-AEDPA case holding trial court must consider relevant circumstances); *U.S. v. Alvarado*, 951 F.2d 22 (2nd Cir. 1991) (non-habeas, federal case stating that judicial officer is *entitled* to assess race-neutral explanation in light of all relevant evidence, but ultimately deferred to factfinder because credibility finding of no discriminatory intent was supportable); *U.S. v. Hill*, 146 F.3d 337 (6th Cir. 1998) (non-habeas, federal case requiring a finding of clear error to reverse, but remanding for a detailed explanation under step three).

applied a Title VII test somewhat similar to the *Batson* formulation. There, a jury found age discrimination despite a weak *prima facie* showing and a relatively strong rebuttal by the employer-defendant. On the defendant's motion for judgment notwithstanding the verdict, the trial court upheld the jury's credibility determination and denied the motion. On appeal, the Court of Appeals overrode the credibility determination of the jury and trial court and reversed, rendering judgment for the employer. This Court reversed. And while this Court held that the trier of fact *may* consider evidence and inferences drawn from the *prima facie* case in considering the employer's non-discriminatory explanations, *id.* at 143, the emphasis was not on the relative strengths of the competing positions, but rather, on the credibility determinations of the factfinder. *Id.* at 150. This Court's ultimate conclusion that "the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury's" parallels the Director's position here. A federal reviewing court under 28 U.S.C. § 2254(d)(2) may not substitute its judgment concerning the weight of the evidence for the state courts' credibility determination when the evidence supports the finding. *Hernandez*, 500 U.S. at 369.

As a practical matter, requiring a trial court to apply different levels of scrutiny dependant on the strength of the *prima facie* claim in making its credibility determination improperly penalizes those defendants who do not have the advantage of historic discrimination to pad their *prima facie* claim. For example, assume a prosecutor discriminated in fact, and the defendant was only able to demonstrate factors in his case

alone to support a *prima facie* claim. Applying Miller-El's shifting scrutiny test, the trial court would be required to factor in the relative weakness of the *prima facie* showing to its determination of whether the prosecutor's facially-neutral, but discriminatory, reasons were credible. Whereas, in an otherwise identical case where there was evidence tending to demonstrate historical discrimination that effectively added weight to the *prima facie* claim, under Miller-El's evidentiary formulation, the trial court would be required to factor in the relatively stronger *prima facie* showing to its ultimate credibility determination. These variable levels of scrutiny could lead to disparate results, in spite of the identical discriminatory intent of the prosecutor. This untenable formulation impermissibly detracts from the ability of the trial court to make its own independent credibility determination based on its personal observation, and its ability to consider facial expressions, gestures, vocal inflection, and attitude. Additionally, it is contrary to the law. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985) ("[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said."). As this Court stated in *Hernandez*:

> In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercised the challenge. . . . [E]valuation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."

Hernandez, 500 U.S. at 353.

Miller-El's shifting scrutiny formulation is not the law and Miller-El cites to no controlling authority to support his interpretation of *Batson*. As such, this claim is entirely *Teague* barred and this Court should deny certiorari review.

C. The federal courts below properly applied 28 U.S.C. § 2254 to deny Miller-El relief.

After conducting a *de novo* review, the district court below, citing *Hernandez*, denied Miller-El's *Batson* challenge, deferring to the experience of the trial court judge, and in particular, his unique position of being able to evaluate the demeanor of the parties at the time of trial. The court properly applied 28 U.S.C. § 2254 by independently ensuring that the record supports the trial court's findings. The magistrate's findings reflect that the court conducted a thorough, meticulous review of the record.

The Fifth Circuit also conducted an independent review of the findings of the state court and of the evidence presented by Miller-El in his application. They, too, found that the record fully supported the trial court's determination that there was no disparate questioning of the *Batson* jurors and that the prosecution's reasons for striking the jurors was due to their reluctance to assess and/or their reservations concerning the death penalty. It held that Miller-El had failed to establish clear and convincing evidence to the contrary; and denied relief.

In light of the detailed, independent review undertaken by every court throughout Miller-El's appellate process on this claim, this Court should not grant certiorari.

III. The State Habeas Court's Factual Finding That Miller-El Was Mentally-Competent to Stand Trial Is Supported By The Record And Is Thus Reasonable, And The Court Below Properly Found That Habeas Relief is not Warranted.

Miller-El's competency claims failed in the courts below because Miller-El could not link his unquestionable physical discomfort with the test for *mental* incompetency as outlined in *Dusky v. United States*, 362 U.S. 402 (1960). Applying the standard of 28 U.S.C. § 2254, the courts below found that the state court determination was reasonable and not clearly erroneous. Here, Miller-El complains that the state habeas court used an unreasonable process to determine that Miller-El was competent in fact. But, the state court's process and its ultimate determination were neither unreasonable, nor erroneous, and as such are entitled to deference.

A. The record reflects that Miller-El was competent in fact at the time of his trial.

The conviction of a mentally-incompetent accused person is a violation of due process. *See Drope v. Missouri*, 420 U.S. 162, 172 (1975). Due process requires that a hearing be held whenever evidence raises a sufficient doubt about the mental competency of an accused to stand trial. *See id.*, 420 U.S. at 180. The test for determining a defendant's mental competency is "whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceeding against him." *Dusky*, 362 U.S. at 402.

Miller-El did not challenge his competency to stand trial at the time of his trial or on direct appeal. It was not until Miller-El's state habeas appeal, nine years after his trial and conviction, that the allegation of mental incompetency was raised for the first time. At trial, there was no suggestion or indication that Miller-El was mentally incompetent to stand trial. Indeed, Miller-El's attorney and the trial court both made statements during the trial completely to the contrary. For instance, after the State concluded its case-in-chief, the trial court inquired as to whether Miller-El desired to testify on his own behalf. 3 SR 1195. Significantly, after questioning by the court and its finding that Miller-El knowingly and intelligently waived his right to testify, 3 SR 1195-97, the following exchange occurred:

> THE COURT: . . . Mr. Cunningham and Mr. West [attorneys for Miller-El], it might be a bit late to ask this question, but I've seen no evidence that the Defendant is not competent to either stand trial or make these decisions on his own behalf.
>
> MR. CUNNINGHAM: Your Honor, to the best of my knowledge, Mr. Miller-El is competent and is aware of the facts and knows what is going on. Is that true, Mr. Miller-El?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Well, I'll note for the record that throughout the trial including voir dire that this Defendant appeared, from the bench, to participate actively with his lawyers in jury selection decisions and also during the trial as regards cross-examination of witnesses and such as that. Having heard nothing else, I'm going to find that he makes his decision competently and I, of course will honor it.

3 SR 1197-98.

This exchange went unchallenged. The failure of defense counsel to raise the issue of competency at trial is persuasive evidence that Miller-El was indeed competent. *Reese v. Wainwright*, 600 F.2d 1085, 1092 (5th Cir. 1979). That the trial court's factual findings regarding Miller-El's competency to stand trial were made on the record and not reduced to writing, is of no constitutional significance. *Wainwright v. Witt*, 469 U.S. 412, 430 (1985).

B. The state habeas court's review process was reasonable.

The evidence also supports the reasonableness of the state habeas court's review process. When Miller-El first raised the competency issue in his state habeas appeal, the court ordered supplemental briefing on the matter that the parties submitted with expert affidavit testimony attached. Before making its competency determination, the state habeas court had before it for consideration: the complete trial record, supplemental briefing by both parties, expert affidavits by both parties, and its personal recollection—having been the sitting judge at trial.

Miller-El alleges that the state habeas review process was unreasonable because: (1) the state habeas court merely rubberstamped the findings of fact drafted by the assistant district attorney; (2) the court's findings did not mention by name his expert witness' affidavit; and (3) the court did not hold a "live" evidentiary hearing. These reasons, however, are insufficient given the unpersuasiveness of Miller-El's expert affidavit and in light of the probative evidence contained in the record indicating competency.

On habeas review, Miller-El centered his argument for a showing of incompetency around the affidavit testimony of Dr. Ari Kiev, psychiatrist and lawyer, who boldly concluded:

> . . . [B]ecause of the depressive effects of a prosthesis such as a colostomy, which reduces the recipient's ability to deal with stress, his physical debilitation and a depressive reaction secondary to his injury and circumstances, which produces apathy and lethargy, [Miller-El] had given up and resigned himself to his fate, and was not showing any of the self protectiveness and survival instincts which would otherwise be normal under the circumstances. As such, it is my opinion, in terms of reasonable medical certainty, that Mr. Miller El would have exhibited such a level of passivity and willingness to go along with whatever was offered that it amounted to an expression of a suicidal intent to end his life . . . .

See Affidavit of Ari Kiev, M.D. at 5.

This is contrary to the trial judge's observation that Miller-El "participated actively" with his attorneys throughout his trial. 3 SR 1197-98. Significantly, Dr. Kiev's affidavit does not state that Miller-El did not have the ability to consult with his lawyers with a reasonable degree of rational understanding. *See* Affidavit of Ari Kiev, M.D. Also, Dr. Kiev's affidavit does not state that Miller-El did not have a rational and factual understanding of the proceedings against him. *See id.* At best, Dr. Kiev's affidavit merely states that due to his weakened physical condition, Miller-El had a reduced capacity to participate "to the best of his normal abilities." *See id.* at 4.

Notably, throughout his appeal process, and despite voluminous documentation of Miller-El's surgical procedures and graphic detail about his subsequent physical ailments,

Miller-El has said little directly linking the standard for determining competency under *Pate*[7] and *Dusky* with Miller-El's physical problems. *Pate* merely asks whether the defendant has the ability to consult with his attorneys and understand the proceedings against him. It was reasonable for the state judge to conclude, based on the evidence before him, that Miller-El's physical discomfort was not probative of mental incompetence. As the federal Magistrate's Report noted, "Nothing in the trial record suggests that he lacked the capacity to understand the proceedings, consult with his lawyers, or assist in the preparation of his defense." Findings, p. 36. Moreover, the fact that the trial judge conscientiously exhibited regard for Miller-El's physical well-being by ensuring that Miller-El was physically fit to sit through trial is wholly independent of mental competency. Mental competency simply was not at issue.

Miller-El contrasts the competing expert affidavits presented by the parties without emphasizing the other evidence available to the reviewing judge in concluding that Miller-El was competent, including the supplemental briefing done by both sides and, most relevantly, the fact that the reviewing judge himself was the presiding judge at trial, who witnessed first-hand the demeanor and interaction of Miller-El with his attorneys at trial. Moreover, the fact that Miller-El himself along with his attorneys stated that he was competent on the record offers compelling evidence that Miller-El was, in fact, competent.

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[7] *Pate v. Robinson*, 86 S. Ct. 836 (1966).

Given the evidence before it and the review process undertaken, the state habeas court reasonably found that Miller-El was able to consult with his attorneys and was able to understand the nature of the proceedings against him.

C. The federal courts below properly applied 28 U.S.C. § 2254 to deny Miller-El relief.

Miller-El failed to demonstrate by clear and convincing evidence that his physical discomfort rendered him mentally incompetent to stand trial and, thus, the court below properly denied relief on his claim. Given that Miller-El's competency claims were fully-developed at state habeas review, the analysis progresses under sections 2254(e)(1) & (d)(2), which control how a federal court treats factual determinations made on the merits in state court.

In a habeas lawsuit, a state court's factual finding of competency is presumed correct. *See Maggio v. Fulford*, 462 U.S. 111, 117 (1983). The state habeas court expressly concluded that Miller-El was competent, finding that, "during all stages of his capital murder trial, [Miller-El] had the capacity to understand the nature and object of the proceedings against him, [and that] he consulted with counsel, and he assisted in preparing his defense." 1 FF 6, ¶ 17. Moreover, the state habeas court entered the following determination based on all the evidence before it that Miller-El "had the present ability at trial to consult with his lawyer with a reasonable degree of rational understanding and that he had a rational as well as factual understanding of the proceedings against him." *Id.* at 7, ¶ 18. Additionally, based upon the State expert's affidavit, the court found that Miller-El was competent both on and

off his pain medication. *Id.* at ¶ 19. Furthermore, the court found that no evidence existed of Miller-El's alleged incompetency at the time of trial, and that Miller-El actively assisted in his defense. *Id.* at ¶ 20. These findings were echoed by the Court of Criminal Appeals when it adopted the habeas court's findings, and are more than adequate to justify the state court's findings that Miller-El was competent in fact to stand trial.

Although the state court did not discuss the expert affidavit offered by Miller-El during collateral review, that fact does not overcome the presumption of correctness afforded the factual findings under section 2254(e)(1). By denying relief, the court implicitly rejected Dr. Kiev's affidavit, and the presumption of correctness also applies to implicit findings. *Marshall v. Lonberger*, 459 U.S. 422 (1983). Because everyone present at trial, including the judge, Miller-El, the defense attorneys for Miller-El, and the prosecuting attorneys have all at some point in time expressly stated that Miller-El was competent in fact at trial, it was reasonable for the courts below to defer to the state courts' factual determinations on this issue. Additionally, under section 2254, it was not error for the federal district court to conclude that the state court's decision was reasonable.

IV. The Fifth Circuit's Treatment of 28 U.S.C. §§ 2254(d)(2) & (e)(1) in Miller-El's Case is a Proper Application of the Statute.

In his attempt to avoid execution, Miller-El procedurally attacks the Fifth Circuit Court of Appeals' application of 28 U.S.C. §§ 2254(d)(2) & (e)(1) to his *Batson* and competency claims. Specifically, Miller-El alleges that the court below created an insurmountable presumption of correctness by requiring him to demonstrate

unreasonableness by clear and convincing evidence. To be exact, the court below stated:

> As an appellate court reviewing a federal habeas petition, we are required by § 2254(d)(2) to presume the state court findings correct unless we determine that the findings result in a decision which is unreasonable in light of the evidence presented. And the unreasonableness, if any, must be established by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

Miller-El v. Johnson, 261 F.3d 445 (5th Cir. 2001).

But, because the state court decisions on both Miller-El's *Batson* and competency claims were documented with abundant probative evidence, they were entirely correct and Miller-El is not entitled to relief regardless of section 2254's filter.

Additionally, the Fifth Circuit's approach was correct and mandated by logic. Labeling the court's construction as "extraordinarily deferential"and "extravagantly generous" to the state courts, Miller-El alleges that the court "effectively insulate[s] state factfindings from federal review." Yet, in a case such as Miller-El's where the sole issue on review involves a single, disputed, outcome-determinative finding of fact—The prosecution did not discriminate and Miller-El was competent in fact—the Fifth Circuit's construction was logically correct and proper.

A finding of unreasonableness is an absolute prerequisite to federal habeas relief on a state court determination of fact. 28 U.S.C. § 2254(d)(2). And while it is possible for a state court determination to be reasonable despite an incorrect finding of fact, the converse is not true in a case involving a single, outcome-determinative finding of fact. In other words, a case may not be found to be *un*reasonable if the sole outcome-determinative fact

issue is correct; only an incorrect fact can make a state court determination unreasonable.

Because a state court fact finding is presumed correct until clear and convincing evidence shows otherwise, it follows that a state court finding cannot be unreasonable until clear and convincing evidence proves the underlying fact incorrect. Therefore, the Fifth Circuit was legally and logically correct in holding that Miller-El must prove unreasonableness by establishing clear and convincing evidence.

Miller-El's case is the perfect illustration of this logic. For instance, in his *Batson* claim, Miller-El alleged that the prosecution improperly discriminated by exercising peremptory strikes against blacks at voir dire. The state court applied *Batson's* three step evidentiary formulation. At step three, the state court determined that the prosecution's reasons were credible and made the factual determination that the prosecution did not impermissibly discriminate. This factual determination is the sole issue Miller-El challenges here on this claim. And under section 2254(e)(1), this determination is presumed correct.

After careful review of the record, the federal courts below determined that Miller-El failed to overcome this presumption by clear and convincing evidence since the state court's step three reasons are supported by the record with probative evidence. Thus, the factual determination remained presumptively correct and, hence, not unreasonable.

The same analysis applies to Miller-El's competency claim. At state habeas review, Miller-El challenged his competency to stand trial. The state habeas court found that Miller-El was competent in fact at the time of his trial, which is solely a question of fact. The Court

of Criminal Appeals upheld this factual finding in light of the supporting evidence. On federal habeas review, this finding of fact is presumed correct under section 2254(e)(1).

In the federal courts below, Miller-El re-alleged that he was incompetent to stand trial. The reasonableness of the state court's finding of competency was solely dependant on this question of fact. Since the federal courts' independent review of the record echoed the state courts' finding, the courts below found that Miller-El failed to present clear and convincing evidence to overcome the presumptively correct competency determination. Hence, the state court determination was not unreasonable.

Miller-El argues that the Fifth Circuit's approach does not accord independent significance to sections 2254(d)(2) & (e)(1). But this is incorrect. Assuming arguendo that the federal reviewing courts found the state court competency or *Batson* determinations to be clearly erroneous under section 2254(e)(1), that would not end the analysis. They would still need to address the reasonableness of the state court determinations under section 2254(d)(2) in order to grant or deny habeas relief. This point in the analysis is where section 2254(d)(2) adds independent significance to the overall statute.

In this case, since only one factual determination was at issue in each claim, the courts below did not need to progress to this second tier analysis given that Miller-El failed to demonstrate that the state court finding was clearly erroneous as determined by the federal courts' review of the record. In Miller-El's case, it would have been imprudent and illogical to independently address whether a correct fact is reasonable. Contrast the Fifth Circuit's

recent statement in *Valdez v. Cockrell*, ___ F.3d ___, 2001 WL 1530153, at *7 n.17 (5th Cir. Dec. 3, 2001), stating:

> [A] district court may find by clear and convincing evidence that the state court erred with respect to a particular finding of fact, thus rebutting the presumption of correctness with respect to that fact. See § 2254(e)(1). It is then a separate question whether the state court's determination of facts was unreasonable in light of the evidence presented in the state court proceeding. See § 2254(d)(2). Thus, it is possible that, while the state court erred with respect to one factual finding under § 2254(e)(1), its determination of facts resulting in its decision in the case was reasonable under § 2254(d)(2).

Id.

Here, no tension exists between the section 2254(e)(1) and section 2254(d)(2) inquiries since there are not multiple factual questions at issue. Miller-El cites to cases in other jurisdictions discussing the interplay between sections 2254(d)(2) & (e)(1) in his attempt to prevent his execution. But any real or apparent tension existing in the lower federal courts' harmonization between the two statutory provisions is not at issue here. This is not the case to resolve that question.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that this Court deny Miller-El's petition for writ of certiorari.

Respectfully submitted,

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2001

THOMAS JOE MILLER-EL,

Petitioner,

v.

JANIE COCKRELL,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

CERTIFICATE OF SERVICE

I, Jim Marcus, hereby certify that true and correct copies of Petitioner-Appellant's Petition for Writ of Certiorari and Petitioner-Appellant's Appendices to the Petition for Writ of Certiorari were served on counsel for Respondent-Appellee on this 11th day of December 2001, via First Class United States Mail, addressed to:

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APPENDIX "A"

Transcript of the trial court's *Batson* remand hearing.

69677

NO. F85-78668-NL

THE STATE OF TEXAS	I	IN CRIMINAL DISTRICT COURT
VERSUS	I	NO. 5 DALLAS COUNTY, TEXAS
THOMAS JOE MILLER-EL	I	APRIL TERM, A.D., 1988

* * * * * * * * * * * * * * *

HEARING

VOLUME I OF I VOLUME

* * * * * * * * * * * * * * *

FILED IN
COURT OF CRIMINAL APPEALS
JUN 29 1989
Thomas Lowe, Clerk

APPEARANCES:

HON. JOHN VANCE
Criminal District Attorney
Dallas County, Texas

BY: HON. JEFF KECK
and
MS. SHARON BATJER
Assistant District Attorneys

APPEARING FOR THE STATE

HON. ROYCE WEST
and
HON. BRUCE CUNNINGHAM
Attorneys at Law
Dallas, Texas

APPEARING FOR THE DEFENDANT

BE IT REMEMBERED, to-wit: That on the 10th day of May, A.D., 1988, the above styled and numbered cause came on to be heard before The Honorable Pat McDowell, Judge of Criminal District Court No. 5 of Dallas County, Texas, and the following is a true, correct and complete transcript of all the proceedings had:

P R O C E E D I N G S

THE COURT: Let me call, for the record, F85-78668-NL, The State of Texas versus Thomas Joe Miller-El. Let the record reflect these events: This case is a case in which the jury, having answered affirmatively to special issues after the Defendant was found guilty of the offense of capital murder -- this case has been appealed to the Court of Criminal Appeals, State of Texas. I understand that briefs have been submitted and oral argument has been made. The Court of Criminal Appeals ordered this trial court to conduct a hearing which I will characterize as a Batson hearing. That is the purpose and thrust of this hearing this morning.

Are both sides ready on that?

MR. KECK: The State is ready, Your Honor.

MR. CUNNINGHAM: The defense is ready, Your Honor. Your Honor, at this time we would invoke the rule and ask that the witnesses who expect to testify be excluded.

THE COURT: Who will the State's witnesses be, Mr. Keck?

MR. KECK: We have secured the presence of both Mr. Macaluso and Mr. Nelson, Your Honor. I believe we will call Mr. Macaluso to testify briefly and we may then call Mr. Nelson.

THE COURT: In an abundance of caution, I will honor that. I'm not sure it applies in this case. These are both officers of the court, but neither one of them now is a Dallas County prosecutor so technically they're not any better than any other witness. They're just witnesses.

Mr. Cunningham, you're standing preparatory to doing something. I'm going to interpret this as a full-blown Batson hearing. By that I mean, I think I am going to insist that the defense make a showing, at least a prima facie showing, that discrimination was invoked in the State's striking of certain jurors just so, if nothing else, we will have an entire whole record. We thought, frankly, for the record, that we were doing it properly during the voir dire of the capital murder case. I felt that this Court's determination of certain objections made by the defense during that time resolved the issue of my finding on discrimination, but in view of the later cases and the Court of Criminal Appeal's particular order, I'm going to place the burden back on you-all to at least make a prima facie showing that Batson has been violated.

MR. CUNNINGHAM: Your Honor, on behalf of the defense at this time we would ask the Court to take judicial notice that Thomas Joe Miller-El is a member of the negro black Afro-American race.

THE COURT: I don't think there is any dispute

about that, is there, Mr. Keck?

MR. KECK: No, Your Honor. We will stipulate to that.

THE COURT: The Court will do that.

MR. CUNNINGHAM: Secondly, in support of our prima facie case, we would advise the Court or would show to the Court that Roderick R. Bozeman, prospective juror number seven, was a black male and was struck on February 5th of 1986, and was the first strike of the State.

Secondly, that Billy Jean Fields, a black male, was the State's preemptory strike number one and Bozeman was preemptory strike number -- Bozeman was preemptory strike number one and Billy Jean Fields was preemptory strike number two by the State. He was juror number nine. Joe A. Warren, a black male, was struck by the State preemptorily and he was strike number six. He was number twenty-eight on the prospective juror list; that Edwin L. Rand was a black male, that he was struck by the State, that he was the State's preemptory strike number seven and he is thirty-seven on the prospective jury panel list; that Carol S. Bogges, a black female, was struck by the State of Texas and that was the State's preemptory strike number eight and she is number forty on the jury list; that Wayne A. Kennedy, a black male, was struck by the State. He was the State's preemptory strike number nine and he is number

forty-three on the jury list.

Linda C. Baker, a black female, was struck by the State and she was the State's preemptory strike number ten and she was number seventy-one on the jury list. Mrs. Janice Mackey, a black female, was struck by the State and she was preemptory strike number twelve and she is juror number one hundred on the jury list.

Mr. Paul Bailey, a black male, was struck by the State and he was preemptory strike number thirteen. He is number one hundred and two on the jury list.

Finally, Mrs. Anna L. Keaton, a black female, was struck by the State and she was preemptory strike number fourteen. She is number one hundred and five on the list.

The State of Texas, between February 5th of 1986 and March 6th of 1986, exercised fourteen of its preemptory strikes; that ten of those fourteen preemptory strikes used by the State were used to strike either a black male or a black female.

Further, in support of Defendant's prima facie case, we at this time would offer all the evidence beginning on March 12th, 1986 that was offered with respect to its motion to quash and/or suppress the jury panel and/or to strike the jury panel including the testimony of the witnesses John Sparling; Jack Hampton, Judge of the

283rd Judicial District Court; Honorable Larry Baraka, Judge of Criminal District Court Number Two; Honorable Ralph Tate who, at that time was chief public defender; Mr. Norman Kinne, first assistant district attorney of Dallas County, Texas; Mr. Paul Macaluso; the Honorable Harold K. Entz who, at that time, was County Criminal Court Number Four and is presently judge of the 194th Judicial Court; the Honorable Ed. Kincaide who, at that time, was judge of the 194th Judicial District Court and is presently on the Court of Appeals district sitting in Dallas Texas; John Stauffer.

We would also, in support of our prima facie case, offer Defendant's Exhibits Numbers Four, Five, Six, and Seven which were offered during the motion to quash the jury panel because of the systematic exclusion of black minorities and the motion to suppress which the Court overruled and denied and exception was taken thereto. We ask that all the testimony and exhibits that were offered during that hearing be introduced for the purposes of establishing our prima facie case.

We would therefore suggest to the Court that Defendant Thomas Joe Miller-El -- may I have a minute, Your Honor?

THE COURT: Surely.

MR. CUNNINGHAM: Your Honor, could we have a

ruling on the offer of testimony and the offer of proof, Defendant's Exhibits Four, Five, Six and Seven?

THE COURT: Mr. Keck, what is the State's position?

MR. KECK: Well, Judge --

MR. CUNNINGHAM: And the testimony.

THE COURT: Is that on the motion to quash that we heard pretrial?

MR. CUNNINGHAM: Yes, sir. This hearing was conducted after we had completed the jury selection process.

MR. KECK: Judge, we would object to the Court considering any of that evidence. Unless we are mistaken, and we're confident that Mr. Cunningham and Mr. West will correct us if we're wrong, all of that evidence, the testimony of those listed individuals beginning with Justice Farling and also those exhibits, that all went to establishing past racially-based exclusion of minorities in Dallas County. We don't, incidentally, feel that it established that historical fact. The Court recalls that testimony, I guess, but the point is, Batson itself is directed at the prosecutor's conduct in the instant case.

It would be our position, even if every one of these people had testified no black had ever served in Dallas County in the past, that testimony, however

historically and accurate it might be, would be irrelevant to the Court's inquiry of the instant case. The reason that we can inquire when it is appropriate to inquire into the prosecutor's reasoning in the instant case was, as I'm sure the Court recalls, in Batson the Supreme Court said that this historical approach was too difficult for defendants to meet, that it was impossible for them to amass the statistical kind of evidence needed to come up to a Swain versus Alabama type of showing and that's why that evidentiary method was jettisoned by the Supreme Court of the United States.

It is not my position, necessarily, that one can no longer make out a Sixth Amendment claim by showing that kind of historical record, but it is my contention that type of historical record has no bearing on a Batson hearing and this case was remanded to this court exclusively for a Batson hearing. At this time there is absolutely no reason for this Court to consider what may have happened in any case tried in the past in Dallas County or, for that matter, any case tried in the future after this case was tried. All those things are irrelevant and even if they could show no black ever served before or since, in order to get a Batson remedy, they're going to have to show that in this case we struck jurors based on racial motives. If they can't do that, they will lose this

hearing.

MR. CUNNINGHAM: Your Honor, in response to that, Defendant's Exhibit Number Seven was a list of the ten black jurors that were actually struck in this case. That's what one of our exhibits was, Defendant's Exhibit Number Seven. Defendant's Exhibit Number Four was the Dallas Morning News for March 9, 1986, which had information in there about the selection process. Defendant's Exhibit Number Five was the Dallas Morning News for March 10, 1986 and Defendant's Exhibit Number Six was the Dallas Morning News article on March 11th, 1986.

We would further say that Batson clearly says that the defendant may rely upon any other relevant circumstances which raises an inference that the prosecutor used the selection practice to exclude the venireman from the jury on account of their race. That is what we suggest. That motion, our motion to quash the jury, which was held after the jury selection process in this case, because of the systematic exclusion of black minorities, we can rely upon those relevant circumstances. We can further rely upon the facts as to which there can be no dispute that preemptory challenges constitute a jury selection process that permits those to discriminate who are of a mind to discriminate.

THE COURT: Mr. Keck, again, I'm going to

overrule the State's objection to that evidence being before the Court, this Court, on this hearing. What weight, if any, I will give it, I certainly reserve for myself. Just so that the record is whole and the Court of Criminal Appeals wishes -- it has got it already in front of it, I assume. That material went down. Particularly the hearing on the motion to quash the panel went down with the record, I'm sure, did it not?

MR. KECK: Yes, Your Honor.

THE COURT: Of course, the record is clear that I denied your motion to quash the panel at the end of that hearing, so I've already made a determination there. Again, in an abundance of caution, I will admit the evidence. Whether or not I will give it any weight is another question.

MR. KECK: Your Honor, if that concludes the stipulations offered by --

MR. CUNNINGHAM: I think at this point is where the Court decides whether or not we have made our prima facie case. We would ask the Court to rule as to whether or not we have made our prima facie case.

THE COURT: Mr. Keck, do you want to argue on that point?

MR. KECK: Yes, Your Honor. I believe that in a typical Batson situation that might very well be true.

However, here the Court has the benefit of not only now having read the Batson opinion and Keaton and some of these other cases decided by the Court of Criminal Appeals, but it also has the advantage of knowing, I guess, because we have already been through one hearing on this topic, of essentially what is going to be produced.

Specifically, the Court knows that, while the State exercised fourteen preemptory challenges, it had fifteen preemptory challenges. The Court knows that one black served on this jury and that had continued to it from that, that had the state of mind to exclude blacks, that it certainly could have excluded the one black who did serve on the jury.

The Court also knows that the racial composition of the jury consisted of members of other minority races. Finally, the Court knows that the Defendant agreed to the excuse of six members of the black race in exchange for the State, I presume, to excuse other veniremen. We think the Court should consider the ultimate composition of the jury because it knows what that is now and we think the Court should also consider the fact that the Defendant agreed to the excuse of these six black veniremen when it decides -- I mean, I take it the thrust of the Defendant's complaint is I was tried by a jury on which there was only one black person. Part of that is -- part of our point would be, the

reason there is only one black person was because you agreed to excuse six black people. Now, that's not the only reason, the only factor. There is also the State's exercising its preemptory challenge.

We would suggest that all of the relevant circumstances, just as Mr. Cunningham has said, all of the relevant circumstances surrounding the case, can be considered by the Court when it makes its determination of whether or not there is a prima facie case. We would suggest that those facts also ought to be considered. We are not suggesting that the explanation should be considered at this point. We would agree that that is -- you know, in the typical course of a Batson hearing, that is not the way it would proceed. But these other factors relevant to the racial composition of some of these other groups we feel is before the Court and ought to be considered by the Court.

MR. CUNNINGHAM: Your Honor, in response to that, Batson clearly points out the facts that you may have one black. That is not the issue. The issue is whether or not the Defendant has -- well, whether or not there has been a discriminatory selection process. That is our contention with respect to the ten that they used preemptory strikes on. It becomes even clearer, when the Court looks at the number of strikes that were actually

used, fourteen, and then see that out of that fourteen ten were black. To say that there was a black, there was a Philippino, there was a Mexican, and there were two or three women that answers the problem, is not the answer because all the State could do is say, okay. we're going to see which one we want and put him on there and that kills this Batson hearing. That is not Batson. They have to clearly show a specific reason for their use of preemptory strikes on each and every one of the minority, in this case black. The fact that they had one on there don't make any difference. I think that is Batson clearly.

MR. KECK: Judge, I'm not saying that just because a black served on the jury that answers the Court's inquiry. I'm not saying that, but I am asserting that is a factor that this Court can consider along with the fact that we had remaining preemptory challenges to exercise against that black venireman, so we have a situation in which blacks and other minorities served on the jury. To the extent that the State had unutilized preemptory challenges, it could have excluded all blacks from the jury. Now, it got some help from the Defendant's agreeing to excuse six other veniremen, but I'm just saying those are all factors that the Court should consider in determining whether these facts and circumstances raise an inference that the State exercised the preemptory

challenges that it did exercise against blacks based -- you know, by virtue of a racially motivated reason.

THE COURT: Mr. Keck, I'm going to resolve this this way again maybe just because I'm extra cautious, because I think the Batson rule is still being expanded by the Court of Criminal Appeals. Keaton is the closest we've come to having a clear pattern of what to do. I'm going to ask and direct the State to go forward with an explanation of its strikes.

I will ultimately, of course, make the determination as to whether a prima facie case was even established or, if it was, whether or not the State's reasons were racially neutral and then, depending on what I do there, anything else if I go that far. But I think a whole record is the thrust of the Court of Criminal Appeals' order.

I do note, unless you lawyers object -- I kept notes during the voir dire myself and you mentioned six blacks were apparently excused by agreement. My notes indicate those were jurors seventeen, thirty, fifty, sixty-one, sixty-seven and eighty.

MR. CUNNINGHAM: What were they again?

THE COURT: I will give you the numbers. I have juror number seventeen, Mr. Gitchaway; number thirty, Mr. Randal; number fifty, Ms. Miller; number sixty-one, Mr.

Moseley; number sixty-seven, Ms. Collier; and number eighty, Mr. Tarry. Those are by agreement.

The record also probably needs to reflect from my same notes that in excess of sixty jurors out of a hundred and eight who were voir dired were excused by agreement. To go further, my understanding was, some of which is probably not on the record, by giving the various questionnaires to all the jurors, counsel on both sides, under the direction and instance of the Court, encouraged the lawyers to try to agree to excuse jurors who would like to be struck for cause or excused for cause if they were actually voir dired. I think both sides worked toward that end and only voir dired those jurors who appeared to be potentially seated jurors. For whatever value that is, I do not know.

At any rate, Mr. Keck, I would ask and direct the State to go forward with its explanation of striking those ten particular jurors. In doing so, I will say that I certainly will consider in making whatever rule I make in this case all of the voir dire including the composition of the jury, the agreements to excuse. I'm going to rely on my own recollection which might be refreshed by my own notes of various jurors and anything else that is before me. I want this to be a complete record.

Off the record, Pam.

(Whereupon, an off-the-record discussion was held between counsel and the Court.)

THE COURT: Back on the record. Mr. Keck, do you want to go forward?

DIRECT EXAMINATION OF PAUL MACALUSO

BY MR. KECK:

Q Would you State your name, please?

A Paul Macaluso.

Q Would you tell the Court how you are employed, please?

A I'm an assistant United States attorney for the Northern District of Texas.

Q How long have you been so employed?

A Since the first of the year, basically.

Q That is 1988?

A Yes.

Q How were you employed prior to that?

A I was an assistant district attorney for Dallas County, Texas.

Q How long were you employed in that capacity?

A From February of 1973 until the first of this year, 1988.

Q Let me ask you if you are familiar with the case which has resulted in this retrospective Batson hearing, that case being the State of Texas versus Thomas Joe

Miller-El, Cause Number F85-78668-NL?

A Yes.

Q And did you have anything to do with the prosecution of that case?

A Yes.

Q Would you state for the record, please, what your duties in that regard were?

A I was one of three, basically three, assistant district attorneys assigned by the district attorney to prosecute that case.

Q I see. Who were the other assistant district attorneys?

A Mr. Norman Kinne was the lead attorney on the case, myself, and Jim Nelson.

Q Directing your attention to the voir dire examination, was Mr. Kinne present during that voir dire examination?

A Occasionally.

Q Was there any particular problem that he had; was he just preparing for trial or --

A I am assuming he was interviewing witnesses and he had other responsibilities as well. The voir dire, as I recall, took several weeks.

Q Was that kind of part of the game plan, that you-all -- that you and Mr. Nelson would concentrate on the

voir dire and Mr. Kinne would then be lead counsel during the trial of the merits?

A That is correct.

Q From time to time did you, however, consult with Mr. Kinne about the exercise of certain of the State's preemptory challenges?

A Occasionally.

Q Not very often?

A Correct.

Q That would be rare, in fact, that you would do that?

A Pretty rare.

Q Let me direct your attention to -- well, I'm sorry. Let me go over a couple of more general matters.

As you and Mr. Nelson were interviewing the jurors through the voir dire process, let me first ask you whether or not there were jury questionnaires utilized in this case?

A Yes, there were.

Q Those were written forms?

A Yes, sir.

Q And they were passed out to the jurors prior to the time they appeared to be individually examined?

A Yes, I believe in every instance, virtually every instance.

Q And copies have been made of those of the answers that they had written onto the forms and then those copies have been provided to attorneys for both parties and to the Court?

A Yes.

Q Let me ask you if you had an occasion this morning to review the rather large box containing the district attorney's trial files concerning this case?

A Yes.

Q Were you able to find the State's copies of the juror questionnaires in that box?

A Some.

Q Were you able to find any of the questionnaires relating to the jurors who were preemptorily challenged?

A No, sir.

Q Did the forms that you have relate to the jurors who, in fact, served -- or the veniremen who, in fact, became jurors on the jury?

A Yes, that's correct.

Q When you and Mr. Nelson were devoting your attentions to this process, who between you was the senior attorney assigned to the case to represent the State?

A I was.

Q Prior to this trial, how many capital penalty juries have you selected yourself or participated in the

selection of?

A I don't know for sure, but I --

Q Just a rough guess.

A Ten maybe, maybe more, maybe less.

Q How many had Mr. Nelson selected, if you know?

A I don't believe he had done any. This was his first.

Q So you kind of took the lead?

A More or less.

Q Let me ask you: Did you ever come to a point in deciding whether or not to exercise a State's preemptory challenge, that you and Mr. Nelson disagreed about whether or not a preemptory challenge should be exercised against a particular venireman?

A Not that I can recall.

Q If such an eventuality had occurred who, between you and Mr. Nelson, would have been able to make the decision on behalf of the State of Texas?

A In all probability I would have.

Q And possibly you might have consulted with Mr. Kinne in a close situation?

A That's possible, yes.

Q All right. Let me direct your attention then to venireman number one O two. That's Mr. Paul Bailey. I believe yesterday afternoon after the Court had instructed

its coordinator to call me and inform me that we were having the hearing on this matter this morning, you and I met outside the federal courthouse and I gave you a copy of the court reporter's transcription of the voir dire of Mr. Paul Bailey; is that correct?

A Yes, sir, that's correct.

Q It was in a plain brown envelope which I see you brought with you to the witness stand?

A As you see it, yes.

Q I would like to direct your attention, if I could, to page 4167 of that document.

THE COURT: What juror was that?

MR. KECK: This is Paul Bailey, Your Honor, number one O two. This is one of the venireman where no explanation was actually given in the record.

THE COURT: We're assuming that I'm going to review the voir dire record for explanations plus anything else I hear at this hearing?

MR. KECK: Your Honor, as to the explanations which we are giving, as to the eight black men for whom explanations appear, it is my intention to ask the Court simply to take judicial knowledge of those things. I have asked Mr. Nelson to come in simply so that he can be here for any questions the Court might want to ask him about those reasons. If the Court pleases I can have Mr. Nelson

read those reasons into the record.

THE COURT: They are in front of me. I've already reviewed them preparatory to the hearing today. I will be glad, of course, to hear anything else you want to say but, if we can focus on what we have to have, it would be better for everybody.

Q (By Mr. Keck) Now, have you found that passage in your copy of the statement of facts?

A I've found page 4167.

Q All right. Would you --

MR. CUNNINGHAM: Could we take a minute, Your Honor -- could we get your copy back there?

THE COURT: Sure.

(Whereupon, there was a short break, after which the following proceedings were held.)

THE COURT: Let's get back on the record. Mr. West was excused because he had a matter that he had a conflict with and Mr. Cunningham has, of course, no problem with continuing the hearing.

MR. CUNNINGHAM: None whatsoever, Your Honor.

THE COURT: Go ahead, Mr. Keck. I think when I interrupted you-all, Mr. Macaluso was just about to be asked about his reasons for challenging Juror Bailey.

Q (By Mr. Keck) Mr. Macaluso, early on in your

examination of Mr. Bailey, you had begun questioning him about his beliefs about the death penalty and he had indicated certain religious or personal reservations about imposing the death penalty. You had, in fact, challenged Mr. Bailey based on Witherspoon versus Illinois and Wainright versus versus Witt; is that basically correct?

A Yes.

Q Defense counsel examined Mr. Bailey on this point and finally on page -- the page that is directing your attention, the Court even indicated on line twenty-two and twenty-three on page 4167 -- could you read that to the Court just to remind the Court of what was said?

THE COURT: Do you have the record now?

MR. CUNNINGHAM: No, sir. I will use his when he finishes.

Q (By Mr. Keck) Page 4167, beginning with line twenty-one, really.

A "THE COURT: I'll give you-all a few minutes. It's a good question that has been raised." Then parenthetically, "(Whereupon, there was an off the record discussion between counsel and the Court, after which the following proceedings were held.)" "THE COURT: Mr. Macaluso, I'm going to hold that he is qualified. I respectfully disagree with the State on it." It just says, "MR. MACALUSO: Judge, in light of the Court's ruling and

in light of the statements made by the Court, we'll use a preemptory challenge."

Q Now, let me ask you, Mr. Macaluso, at that point the Court had overruled this Witherspoon challenge after having indicated that the Court at least felt it was a good or a close question and at the point that you exercised the preemptory challenge, let me ask you why you did that as to Mr. Bailey?

A From the record, which I have reviewed, it became obvious -- I'm just rereading the record -- from the very beginning that Mr. Bailey had expressed religious, moral, and personal views in opposition to the death penalty. I thought he was very explicit about that. I felt at the beginning of the examination, throughout the examination, and at the end of my examination that's how he felt even though he did change his position somewhere after he was examined by Mr. Cunningham. I just felt that he would not be able to fulfill his responsibilities as a juror in light of any evidence and I exercised a preemptory challenge.

Q In any event, he wasn't, in your view, an ideal State's juror by any stretch of the imagination?

A Definitely not.

Q Because of these reservations he had about the imposition of the death penalty?

MR. CUNNINGHAM: Judge, object to counsel leading.

THE COURT: Don't lead.

Q (By Mr. Keck) Let me direct your attention then to -- I'm sorry. Did the race of Mr. Bailey play any role whatsoever in your decision to exercise a preemptory challenge?

A None whatsoever.

Q If anyone, regardless of race, had given similar answers to his, is it your testimony that you would have utilized a preemptory challenge on such a venireman?

A Without question.

Q Even if it was your last preemptory challenge? I know it wasn't in this case, but --

A No, it wasn't. I have never been in that position but, yes, I would have to say -- I guess I'm speculating to a degree but, yes, I would have had to given his statements in opposition to the death penalty.

Q Now, directing your attention to Venireman Joe Warren, which was the other venireman that I provided you a copy of that voir dire --

MR. KECK: Your Honor, this is the other venireman for whom no explanation was given.

THE COURT: What number was --

MR. KECK: He was number twenty-eight, Your

Honor.

Q (By Mr. Keck) Now, Mr. Macaluso, Mr. Cunningham has already stipulated that this was juror number twenty-eight and that this was the State's number six preemptory challenge; in other words, the sixth preemptory challenge exercised by the State in toto on Mr. Warren. Would you describe that as early or late in the voir dire process?

A I would describe it basically as early.

Q Would you state for the Judge -- I'm sure he is probably familiar but also for the record and the Court of Criminal Appeals. Would you just briefly detail perhaps how your philosophy about exercising strikes changes as we go through the voir dire process from early voir dire to late voir dire, if there is a change?

A Sure. Naturally I prefer to think that I was being conscientious and careful throughout a serious process such as this. I think it is inevitable that early on when you're starting off, of course, examining prospective jurors and you have fifteen strikes that you have the, I don't know if you could call it, luxury for lack of a better phrase or word of using strikes and being extra careful, I suppose.

I'm sure, if I were to go back and examine strikes that I exercised early on in voir dire, I might have found -- in fact, I have had judges kind of kid me

about exercising a strike on somebody who, I later said, I wish I had that strike back later on because you never know what kind of a venire person you're going to encounter later on in the examination.

In answer to your question partially, yes, you're probably more likely to use a strike early on on somebody and you would obviously come down to having used twelve or thirteen. It is just more precious, I guess, is a way of putting it.

Q Of course, the other fact is, you're counting jurors who have actually been selected, too?

A Sure. I left that out. Of course, obviously if you have used twelve or thirteen strikes and you have eleven jurors, that's one thing. If you have used nine or eight strikes and you have two jurors, it is quite a bit different. There is a ratio, I suppose, of the number of strikes you have remaining to the number of jurors you need to complete the jury.

Q Now, directing your attention back to Mr. Warren, just to we understand, in light of that explanation that you just gave, Mr. Warren's -- the decision on Mr. Warren came at a point in which you probably weren't being extra careful --

A Yes.

Q -- for lack of a better word?

A I guess you could say that.

Q Because you still had nine preemptory challenges left even after exercising against Warren?

A I don't recall exactly where in the voir dire examination this particular venire person fell. Assuming that the pages are numbered such -- this page is in the low fifteen hundreds and Mr. Bailey was number forty-one hundred, so there would be some significant distance before Mr. Bailey.

Q Mr. Bailey, just to refresh your memory, was juror number a hundred and two. Mr. Warren was juror number twenty-eight. I realize that they were probably not all called exactly in order, but --

A No, and some jurors were excused.

Q Twenty-eight might be even called before twenty-seven?

A Rignt.

Q Would you state for the Court your reasons for ultimately exercising a preemptory challenge against Venireman Warren?

A I have had a chance to review what appears to be about forty pages of my examination of Mr. Warren and the examination by Mr. Cunningham, I believe. I have noted a few things that tends to refresh my memory with regard to our decision in this case. I'm looking at page -- for

example, on page 1543 at the bottom there at line twenty-three where he was asked by me, "I gather you feel pretty strongly about murder, do you not? I mean, it goes without saying?" His answer was, "Well, it's just like I said, you know. There are cases, I mean, personally, that I feel I wouldn't want to personally be, you know, involved with it if I had a choice, but as far as the case, you know, if I feel that you can avoid it, you know, I think you should."

He had some answers there, and I've got some other pages marked, that made references to -- I thought they were inconsistent responses. At one point he says, you know, on a case-by-case basis and at another point he said, well, I think -- I got the impression, at least, that he suggested that the death penalty was an easy way out, that they should be made to suffer more. Again, I don't have the benefit of the questionnaire itself. Frequently we have information on there that kind of guides us on some of the questions we ask.

He goes on in, I believe, some of the examination by Mr. Cunningham -- and I imagine this would be on the questionnaire, if it were filled out. He makes reference to a brother, I believe, who had been recently convicted. By the way, the section I was referring to just a moment ago about these unusual feelings he had about whether someone is really being punished by the death

penalty or not and ambivalent to -- on page 1532 basically lines nine through seventeen.

Q Could you just read those, Mr. Macaluso, so we could all be reminded of them?

A I assume I'm asking about what the death penalty accomplishes and the question before that was, "What do you think it accomplishes when you feel it does?"

Answer, "I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment."

Back to what I was referring to about -- and I believe it is in response to some questions by Mr. Cunningham on page 1556. On line four there is a reference to apparently something that had happened to the venire person's son. There is a question beginning on line four, a question by Mr. Cunningham, "This mishap that your son was involved in, was that Bengy or Joe, Jr.?" Answer, "That was Joe, Jr." Question, "Did anything happen as a result of that that might affect your decision if chosen as a juror in this case, sir?" "No."

It goes on, question, "That was something at

school?" "Yes, it was." I don't recall in reading my examination of Mr. Warren any mention in particular was made of that initially. I don't know how the time ran on that, but I gather there was something on the questionnaire. I don't have the questionnaire before me nor have I had a chance to see it before I testified here.

At the bottom of page 1556 beginning with line twenty-four, actually line twenty-two, question, "Was your brother-in-law a victim of a crime in Las Vegas?" Answer, "My brother. Yes." "Okay. What type of crime was it?" Answer, "I don't know the details of it, sir. He had to make restitution of some money. It involved some food stamps or something, but I don't know all the details of it. He was convicted and got a probated sentence. He had to make restitution of some money."

Question, "How long ago was that, sir?" Answer, "That was about a year and a half or two ago."

Those are the basic reasons. Without the benefit of the questionnaire, we just felt that he -- you know, at that juncture and at that point in the voir dire examination with nine strikes remaining, we thought it would be best to exercise a preemptory challenge. We did not think he would be a favorable juror for the State.

Q Let me ask you the same question that I asked you about Mr. Bailey, if this particular venireman, that is

Mr. Warren, had presented himself at a time in which you have one more challenge to exercise, one more preemptory challenge, would you have been as likely to think about utilizing it?

A No, I would not have.

Q Also, part of it was just at this point in voir dire Mr. Warren gave his answers and he was not as clearly disfavorable to the State as Mr. Bailey?

A That's correct.

Q And I think you have indicated that Mr. Bailey was, in your judgment, pretty -- about as unfavorable as one could get?

A To the point that we submitted him for cause.

Q With regard to Mr. Warren, did the race of this venireman play any role whatsoever in your decision to exercise a State's preemptory challenge against him?

A No.

MR. KECK: Your Honor, we will pass the witness.

THE COURT: Mr. Cunningham, do you wish to cross-examine?

MR. CUNNINGHAM: Yes.

MR. KECK: Your Honor, could the record reflect that I have tendered to Mr. Cunningham the State's copies of the transcript of the voir dire of both Mr. Warren and Mr. Bailey. He has those available to him for cross-

examination or whatever purpose he would like to use them.

THE COURT: Mr. Cunningham, do you need any time to look through those?

MR. CUNNINGHAM: My understanding is that the Court is going to review those?

THE COURT: Correct. Before I decide anything in this case, I will would like the opportunity to reread the testimony myself at least of these two jurors and probably all of the jurors that were challenged.

MR. CUNNINGHAM: Just so the record will reflect, they were submitted to counsel for the Defendant while the hearing was in process.

CROSS-EXAMINATION OF MR. MACALUSO

BY MR. CUNNINGHAM:

Q Mr. Macaluso, did I understand you to say that the reason why you may exercise a preemptory challenge early in the selection process may differ when you have used a large number of your preemptory challenges?

A That's correct.

Q So that you start out in the beginning and your selecting process in the beginning -- for example in this case beginning on February 5, 1986, when you struck Mr. Bozeman and when you struck Mr. Bailey on March 5, 1986, Mr. Bozeman being number one and Mr. Bailey being with thirteen strikes, your reason for striking Bozeman vis a

vis Bailey is different?

A That would largely be true. The same considerations are made but I -- that largely would be true.

Q So that the more strikes you use and the least number that you have affects how you look at a prospective juror and particularly a black juror as the process goes on?

A No, not with regard to a black juror in that consideration or any other color juror, for that matter. Something else is left out. It is just not the number of strikes. As Mr. Keck pointed out, it is the number of jurors that remain to be seated. I can recall, for example, a situation in this particular case where I can recall vividly one of the persons who was on this jury, I will be honest with you, I would have struck him. If he had been in Mr. Warren's position, I would have struck him faster, if there is such a thing, than I did Mr. Warren.

Q You said what?

A I can recall there was a juror on this case that I would have -- that we accepted. I think he was either the eleventh -- I believe he was the eleventh juror, maybe the tenth juror. I can't recall which, but way on in the process, that I would have --

Q I can't hear you for that door. Now, you were

saying?

A I was saying that I can recall specifically -- I can recall two people that I probably would have struck if they had appeared in the array earlier on, say, if they had switched places and been number twenty-eight where Mr. Warren was. I can recall two individuals that, if I had them occur then, I would have struck them. It occurred later on when we had more seats to fill, we had fewer strikes, and I had to take a chance on them.

Q Were these people that you are talking about actually selected?

A Yes, sir.

Q One of them was a Philippino?

A No.

Q One a Spanish sir name?

A He had a Spanish sir name.

Q So the other one was a black?

A No. It was a white female.

Q Was that juror number twelve?

A I think we're thinking about the same person.

THE COURT: Juror number one O eight, I believe.

Q (By Mr. Cunningham) Ms. Sandra Hearne?

A Nothing personal against either of those jurors, I might add.

Q You did not strike Ms. Sandra Hearne, juror

number one O eight?

A If she was the last juror seated, that's the one.

Q She was the last juror seated.

A Right.

Q And was seated when you had one strike left; is that correct?

A I would have to take your word for it. I'm not denying that it probably is accurate. I think she was the last juror seated. I think we did have one strike left.

MR. CUNNINGHAM: That's all, Your Honor.

THE COURT: Is that all, Mr. Keck? I just have one question that may already have been asked, but why don't you go ahead and finish. I just have a couple of questions which you may have asked and I just didn't hear them.

REDIRECT EXAMINATION OF MR. MACALUSO

BY MR. KECK:

Q Mr. Macaluso, just so we understand, as voir dire progresses, I didn't understand you to say that your feelings about any particular venireman changed. In other words, you like them or dislike them just as much as you would have, but your reluctance or eagerness to exercise a preemptory challenge against this sort of marginal venireman, that may change as the voir dire progresses and

you have used more of your challenges?

A That would be true. A large part of it or at least a substantial part of it is that as things begin to wind down, as you get eight, nine or ten jurors, you can better calculate obviously. You know how many people you need and how many strikes you have left. You can look down the list of people that you have questionnaires, which we examine, and we can make some judgment calls on people we feel would be better suited towards the case in our opinion. We can better estimate how many strikes we're going to need and take those into consideration and some of the strategies that come into play, I'm sure, on both sides in that regard in using strikes at that time. It is much more difficult to do early on in the voir dire.

MR. KECK: Thank you.

RECROSS-EXAMINATION OF MR. MACALUSO

BY MR. CUNNINGHAM:

Q Mr. Warren did not say anything that indicated to you that he would be unfair to the State?

A Well, he didn't say in so many words, no, but I have to go just from my review of his examination on the basis of some of his answers and some of his positions and the other information about his having some family members who had either been convicted of crimes or were on probation or whatever, that I felt he would be more biased

towards the Defendant in the case.

MR. CUNNINGHAM: That's all, Your Honor.

EXAMINATION OF MR. MACALUSO

BY THE COURT:

Q Mr. Macaluso, you have testified to your strategy in selecting the jurors in a capital murder case. And you have participated in voir dire in capital murder selections; is that correct?

A In others?

Q Yes.

A Yes.

Q Can you give me any number?

A How many all total?

Q A ball park figure.

A Maybe fifteen -- not as of that time. Maybe ten at that time.

Q This may not be relevant, but maybe it ought to be in the record. I believe our manner of doing voir dire was to bring up fifty jurors each Monday, to qualify fifty, and then commence to conduct voir dire through that list and then at the end of the week quit and bring up fifty new ones on Monday. Is that how we did this case? Did I recall it correctly?

A Yes.

Q Which again may or may not affect the strategy

of either side in exercising their strikes; in other words, not knowing what is going to come the next Monday?

A I don't recollect there was a special venire in this case.

MR. CUNNINGHAM: There was not a special venire. In fact, we started with a brand new panel the following Monday.

A I do recall now that I believe Mr. Nelson and I would alternate with Mr. West when making shuffles, I believe, down in the central jury room on the various Mondays.

Q I recall many shuffles. That's why I asked that question.

MR. CUNNINGHAM: There was a shuffle each Monday.

THE COURT: That's all I have.

MR. CUNNINGHAM: This is also true, I think, that if there were ten, eleven, or whatever the number was, that were not reached when we broke on Friday, every one after that number was excused from service.

THE COURT: I think that is true.

MR. CUNNINGHAM: And then on Monday we started the process all over again with a brand new panel.

MR. KECK: Your Honor, before Mr. Macaluso is excused I should mention that, in fairness to Mr.

Cunningham, I intend as to Venireman Bozeman, venireman number seven, to ask the Court to take judicial notice of the explanation that was given for the exercise of the State's preemptory challenge against Mr. Bozeman. That explanation was given by Mr. Macaluso and it appears in volume number one, really, of the voir dire, which is page 323 and 324, according to my records.

THE COURT: You have set that same matter out in your motion for rehearimg your brief. Is that what you are referring to?

MR. KECK: Yes, Your Honor.

THE COURT: I have that in front of me.

MR. KECK: I mention it only so that perhaps we can excuse Mr. Macaluso. I did mention it in the brief, but I have the reason here -- it may be that Mr. Cunningham would like some opportunity to cross-examine Mr. Macaluso on that reason before he leave the stand. Mr. Nelson provided the State's reasons for the exercising of the State's challenge as to the other seven veniremen. He is also available to be cross-examined. I just thought we might give Mr. Cunningham that opportunity now.

MR. CUNNINGHAM: Your Honor, if I had wanted one, I would have used --

THE COURT: Beg your pardon?

MR. CUNNINGHAM: As far as I am concerned, Mr.

Macaluso can be excused if the State has no further questions they want to ask him. The defense has asked him all the questions they want.

THE COURT: Anything else, Mr. Keck?

MR. KECK: No, Your Honor.

THE COURT: Mr. Macaluso, you can be excused. Thank you, sir.

Mr. Keck, does the State have any additional evidence it wants the Court to consider on the hearing?

MR. KECK: Not at this time, Your Honor, other than the fact that we would like the Court to take judicial notice of all of the explanations for the other eight veniremen. Those are set forth in our motion, but you might want to write down -- I'm not sure that it says as to all of them the specific place in the record.

Now, the State and the appellant used a numbering system for the -- because of the edition of the transcript, there may have been two transcripts or a preliminary hearing that was also reported, but the numbers that I have used in my brief do not correspond to the numbers of the voir dire. For example, the volume number ten of the voir dire, we refer to in our brief as R-12. In other words, there are two more added onto it. There are references in my motion that reflect the two plus, if you will, system of indicating the volume of the transcription.

As to Anna Keaton, the explanation provided by Mr. Nelson to the Court is found at volume thirteen, page 4373.

MR. CUNNINGHAM: Wait a minute. Volume thirteen, page what?

MR. KECK: Page 4373.

THE COURT: That is the numbering system that is in the Court of Criminal Appeals'; is that correct?

MR. KECK: Yes, Your Honor. If you went back and looked at these volumes, it would appear to be like volume eleven, Volume XI.

MR. CUNNINGHAM: Where do you get thirteen?

MR. KECK: Well, we call this R-13 because, you know, R-1, our transcript -- I think maybe there were two transcripts or maybe there was some preliminary hearing even before voir dire that was really R-2. See, what I'm getting at is, it says ten but really we both called it R-12. On the cover of it, it says volume ten of voir dire.

With regard to venireman Mackey, the explanation is found at Roman numeral thirteen, 4374. I believe also at that page, the Court itself recognizes that it can see that Juror Matthews is not an ideal juror although the challenge for cause is overruled by the Court.

We've already gone over Juror Bozeman. With regards to Venireman Fields, that explanation is found at

page 450 of the first volume of the voir dire. That's R-3. Again, that explanation was provided by Mr. Nelson. I think that explanation is perhaps reiterated in the State's motion that the Court has been provided with.

With regard to Venireman Rand, that explanation by the State is found at Roman numeral six at 1855 and 1856. I believe that is also set forth in our motion, Judge. The voir dire of Venireman Rand begins at 1805, Your Honor.

With regards to Venireman Bogges, number forty, the explanation given by the prosecutor, again that was Mr. Nelson in giving the explanation, is at Roman numeral six, 2043.

With regard to Venireman Kennedy, Mr. Nelson's explanation appears at our Roman number seven dash 2939 through 2940 and I believe that is also reproduced in our brief, Your Honor.

The final explained venireman that Mr. Nelson provided explanations at volume ten, page 3017 through 3018.

We would ask the Court to take judicial notice of all those explanations and we would submit that they were given at a time that the prosecutors had both discussed the matter and reflected the contemporary reason before this case has been remanded. I would also like the

record to reflect that I know the Court whenever it recesses has seen Mr. Nelson and Mr. Nelson has been in the witness room and he is ready to be cross-examined on any of these reasons by Mr. Cunningham if that is his desire. I don't think it would serve the State's purpose or interest to examine him seeing as the reasons are all in the record and available for the Court's consideration.

THE COURT: Thank you, Mr. Keck. Mr. Cunningham, I will give you a chance to reply to any of that, if you wish, but are both sides prepared to close evidence now?

MR. CUNNINGHAM: Yes.

MR. KECK: Yes, Your Honor.

THE COURT: I'm going to, of course, reread the voir dire of the ten challenged jurors. I did read some of it already after you filed your earlier motion with the Court of Criminal Appeals. I found what I read consistent with your summary and your motion, so I don't suspect that it is not accurate.

Do you-all wish to make argument on this at this point in time? I don't know if this is particularly a fact-finding hearing as I understand the Court of Criminal Appeals' mandate, but I certainly think there is a position that one side or the other can take.

MR. KECK: Your Honor, I would just submit to

the Court that the Court itself -- and you might also want to make a note of this: At page our Roman numeral fourteen dash twenty-two, the Court found that on every strike where the defense asked for an explanation, the State has provided satisfactorily to the Court it as not being racially motivated. That was before Batson came down, before anything that maybe challenges or changes the way the Court is thinking about things. I think that is an important finding. As to those eight veniremen, black veniremen, who were preemptorily challenged by the State, this Court at the time the matter was fresh in its mind felt that the prosecutor's explanations satisfied the Court that they were not racially related reasons.

In Keaton versus State -- now, this is the last Keaton, Keaton number three, the one that was decided on April 6th, 1988. I know the Court has read this. On page eight and nine, the Court of Criminal Appeals in Keaton refers to these five factors which will weigh heavily against the legitimacy of any explanation which is offered by the prosecutors. Those factors are, first, that an explanation based on group bias where the group trait did not show to apply to the challenged juror specifically. I would submit to the Court that there has been absolutely no indication that any of the explanations are subject to this first factor.

Second, that no examination or a perfunctory examination of the challenged juror. Again, I would submit that the Court can see that all of these black veniremen were examined extensively. This isn't a situation where the State just asked a few questions of the black veniremen and then struck them. The implication of that, of course, would be, well, we were going to strike them all along because they were black. That certainly didn't happen in this case.

The third factor, just for an examination of the challenged juror, i.e., questioning a challenged venire person so as to evoke a certain response without asking the same question of other panel members. Here there probably were certain questions that were asked of certain of these black veniremen who were challenged by the State that were not asked of all the veniremen. But to the extent that that occurred, the State would suggest that -- for example, Mr. Bailey, he had indicated on his form, and it is clear through the whole context of his voir dire, that he had his opposition to the death penalty.

Of course, the white and other nonwhite veniremen who didn't make those responses, they weren't questioned about them as thoroughly -- or their feelings about the death penalty as thoroughly as the jurors who did indicate a reservation about imposing the death penalty.

Our point would be, to the extent that there was a just for examination, it can be explained by nonrace-related factors. Probably in most cases, the jurors answered these questions that the prosecutors testified they relied on.

The fourth factor, the reason given for the challenge is unrelated to the facts of the case. I think there is none of these situations where it can really truly be said that the reasons given were not somehow related to the facts of the case.

Finally, this is for a treatment where there is no difference between the responses given in an unchallenged venire person. At no time has the Defendant urged that there are unchallenged venire persons who did not have these same traits that the prosecutors testified either at trial or in this hearing that they relied on in exercising the State's preemptory challenges.

We urge the Court to conclude that there is no reason to discount the explanations given by the prosecutors at this hearing or at the time they were called upon to give explanations at trial. For that reason, the Defendant has failed to show that the explanations, which were given by the prosecutors, were incorrect or should not be accepted by the Court. The State has gone forward with its burden of producing evidence and the Defendant has failed to sustain his burden of proof on the issue of the

racial-related reasons. For that reason, we think this Court should find that none of the State's preemptory challenges were exercised for a racially-related motive.

THE COURT: Mr. Cunningham, do you want to reply to that?

MR. CUNNINGHAM: Not at this time, Your Honor. We may at a later date after we review the record and also, hopefully, by the time we have an opportunity to review the facts of this particular hearing -- then we may ask the Court to let us present oral argument, but it would be after we get -- after we have an opportunity to review the record voir dire of these ten and also look at the hearing today as the Court is going to do.

MR. KECK: Would the Court prefer to have some sort of proposed findings of fact?

THE COURT: Mr. Cunningham, without prejudging the case, I'm going to find at this point, based on what I've heard today and my recollection of it all, to agree with Mr. Keck's position, but with this qualification: I want the same benefit of everything that you've talked about and that is to review the records myself. I'm going to ask Mr. Keck though, in anticipation of this hearing that we're going to have, to prepare some proposed findings and conclusions so that he can furnish the defense a copy, of course, and I will have those in front of me at the time

that we have our hearing.

MR. KECK: It may be useful to have Mr. Cunningham prepare findings also and then you will have both of them.

MR. CUNNINGHAM: If you want me to, I will prepare findings establishing a prima facie case. You can then prepare yours where you say there are specific reasons with respect to the ten and we would ask for a few days after his reasons for the ten so maybe we could have some counter findings of facts.

THE COURT: Mr. Keck, can you get your proposed findings in by next Monday? Is that too soon in view of the fact the record we had here today won't be -- or is that too soon?

MR. KECK: I need a couple of days after the record is --

THE COURT: Off the record.

(Whereupon, the proceedings in this cause were concluded.)

STATE OF TEXAS I

COUNTY OF DALLAS I

I, PAMELA SMITH, Official Court Reporter in and for Criminal District Court No. 5 of Dallas County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all the proceedings directed to be included in the statement of facts in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

Witness my hand, this the 16th day of May, A.D., 1988.

PAM SMITH,
OFFICIAL COURT REPORTER
Certification No. of Reporter: 112
Date of Expiration of
Current Certification: 12-31-88

CRIMINAL DISTRICT COURT NO. 5
Dallas County Courthouse
600 Commerce
Dallas, Texas 75202
214/749-6696

APPENDIX "B"

Review of the Ten Challenged *Batson* Veniremembers
(As excerpted from the Director's Response in
Opposition to Certificate of Appealability).

REVIEW OF THE TEN CHALLENGED *BATSON* VENIREMEMBERS
(As excerpted from the Director's Response in Opposition to Certificate of Appealability).

The record demonstrates that each *Batson* juror was challenged based on reasons directly related to their in-court responses. As reflected by the voir dire proceedings, the state court fact-findings are clearly reasonable in light of the evidence before the court.

I. The Peremptory Strikes Were Permissible Because They Were Race-Neutral, Specific, and Supported by the Record.

Ten *Batson* jurors were peremptorily challenged by the State.[1] In Miller-El's instant Application for COA, he addresses the peremptory challenge of six of the ten *Batson* jurors. A summary of the six peremptory strikes and the State's race-neutral reasons follows:

- **Roderick R. Bozeman [No. 7]**

Mr. Bozeman was the first African-American juror questioned. The State justified this prospective juror's exclusion on the race-neutral basis of this juror's hesitation in imposing the death penalty and the State's concerns about this juror's views on rehabilitation. 1 VD 280-82.

Under questioning by the prosecution, Mr. Bozeman classified himself as the type of person who believes in the death penalty as a general proposition, but who wouldn't want to be the person on the jury who would actually make the decision. 1 VD 282. Mr. Bozeman also expressed his belief that the death penalty was not proper for a person capable of being rehabilitated, but equivocally stated that he didn't think that his views on rehabilitation would affect his ability to serve as a juror. 1 VD 298. Critically relevant in a peremptory situation, and entirely missing from Miller-El's discussion of this juror, Mr. Bozeman further stated, that even if the special issues clearly could be answered beyond a reasonable doubt in a way that a death sentence would be the result, he might refuse to answer the questions honestly in order to avoid imposing the death penalty if he personally felt like the defendant should not be executed. 1 VD 301. Subsequently, the State exercised a peremptory challenge on Mr. Bozeman.

Upon the State's challenge, the defense offered for the record the fact that Mr. Bozeman was the first black juror questioned, suggesting that Mr. Bozeman was challenged on the basis of race. 1 VD 322. In light of the defense's observation, the court asked the State whether Mr. Bozeman was excused for reasons other than race. 1 VD 323. The prosecution responded:

---

[1] The original venire consisted of 108 persons. 1 Tr 9. Of these,18 were black. Of the 18 blacks, six were excused by the agreement of the parties, leaving 12 potential black jurors. Out of the 12, one black veniremember, Ms. Virginia Smith, was stricken for cause after the trial court found that her views on the death penalty would prevent or substantially impair her ability to serve as a juror. Another, Troy L. Woods, was empaneled on the petit jury. This left 10 black jurors who eventually were peremptorily excused.

> I would state without hesitation or reservation that [the excusal] is not [on account of race], Your Honor. Although not required to, I would state at this time that I have reservations and I'm exercising a preemptory [sic] challenge in this particular situation because of the general answers of . . . Mr. Bozeman, and specifically with regard to his feelings on the death penalty, his feelings and his position with regard to rehabilitative aspects of an individual charged with this sort of crime, his obvious hesitation, which is on the record, with regard to being able to override his personal feelings with regard to somebody receiving a life sentence, and that he also said earlier that he felt the prior pattern of conduct would not necessarily be enough to convince him that a person was worthy or entitled to a death sentence, and other matters.

1 VD 323-24.

These reasons offered by the prosecution were clearly-articulated, race-neutral, and trial-related. Additionally, they were supported by the record, not patently pretextual, and they were specific. Thus, the court was reasonable in finding that there was no *Batson* violation here.

- **Billy Jean Fields [No. 9]**

The prosecution challenged Mr. Fields for two explicitly race-neutral reasons. First, the prosecution was concerned about Mr. Fields' willingness to impose the death penalty given his deeply-religious belief in the rehabilitative capacity of all persons. Second, the State was concerned about the fact that Mr. Fields' brother was convicted several times and served time on a possession of a controlled substance charge. 1 VD 435-36. Miller-El argues that these grounds were pretextual, and he

makes several juror comparisons to support his claim. As the Magistrate's report in the court below indicated, however, "[a] comparison between jurors is not probative unless they are similarly situated." *See* Findings and Recommendation of the United States Magistrate Judge, p. 18 (citing *Hicks v. Johnson*, 186 F.3d 634, 637 (5th Cir. 1999), *United States v. Jimenez*, 77 F.3d 95, 100-01 (5th Cir. 1996)). *See also*, *U.S. v. Webster*, 162 F.3d 308, 350 (5th Cir. 1998) (holding that jurors are not similarly situated where there are different combinations of qualities).

During voir dire, Mr. Fields made the statement that when "an individual has really been truly reached by someone reading the word of God to him and they are repentant and they do have a real act of contrition, they can be rehabilitated and that's been demonstrated." 1 VD 424. In challenging this juror's dismissal as pretextual, Miller-El compares Mr. Fields' religious-based rehabilitation convictions with another juror's (Kevin Duke) feelings on rehabilitation. *See* App. for COA, pp. 59-60. The two views are distinguishable on moral versus legal, and absolute versus conditional, rehabilitative principles. While Mr. Fields' beliefs were solely grounded in the unconditional ability of the "word of God" to rehabilitate, Mr. Duke discussed rehabilitation in the conditional "*if* someone can change" context, emphasizing the parole board's role in assessing whether a convict was truly rehabilitated. *See* App. for COA, p. 59 (juror comparison). The two views are different. Mr. Fields was

dismissed because of concerns regarding his unconditional religious beliefs, while Mr. Duke lacked the same absolutist fervor.

Second, the prosecution cited Mr. Fields' brother's multiple convictions as grounds for concern in dismissing Mr. Fields. Miller-El argues, because the State did not challenge a white juror, Mr. Noad Vickery, whose sister was similarly convicted, that this indicates that Mr. Fields' excusal was clearly pretextual. *See* App. for COA, p. 63. There are differences, however, between the circumstances of the crimes, and the manner that they were answered by the two prospective jurors, that raise legitimate peremptory concerns regarding Mr. Fields' sincerity. For example, upon questioning by the prosecution, Mr. Fields testified that, although his brother was convicted "on a number of occasions," he did not "really know too much about it" despite the fact that the convictions were in Dallas. 1 VD 435-36. Contrast Mr. Vickery's more explanatory testimony, that his sister's conviction occurred in California when Mr. Vickery was a teenager, as his reason for not knowing all the details of her conviction. *See* App. for COA, p. 63. Moreover, the Fifth Circuit has held that jurors are not similarly situated where the jurors have different combinations of qualities. *Webster*, 162 F.3d at 350. Here, in his attempt to exhibit juror similarity, Miller-El draws character qualities from a compilation of different white jurors who collectively possessed related characteristics and circumstances to those of Mr.

Fields. This patchwork juror comparison does not suffice to establish pretextuality.

The state court's decision finding no *Batson* violation here was reasonable. Both reasons cited were race-neutral, specific, and supported by the record.

- **Joe A. Warren [No. 28]**

The prosecution gave a race-neutral response that Mr. Warren was excused due to inconsistencies in his responses concerning the death penalty. 1 BRH 30. Also, the prosecution appeared to be concerned about Mr. Warren's feelings that the death penalty might not serve a purpose, and whether he agreed with the death penalty in all cases. 3 VD 1526, 1532. The prosecution was possibly concerned about this juror's son who may have been involved in some criminal offense, and his brother who was a convicted felon. 1 BRH 31-32; 3 VD 1556; 1 PTH, Defense Ex. 7, Questionnaire of Joe Warren at 4; 1 Supp. Tr. 3. Finally, the prosecutor explained that the strike of this juror came at a time when the State had additional peremptory challenges which could be used to strike marginal jurors. 1 BRH 33. These reasons are clearly supported in the record, race-neutral, articulate, and specific. Furthermore, review of Mr. Warren's testimony reveals a morals-based mentality that is skeptical of the propriety of the written law.

Throughout his testimony, Mr. Warren continually imposed his own morals-based opinions in challenging the propriety of the law as written. For example, Mr.

Warren indicated a belief that the death penalty as administered is not sufficiently punitive and that executing murderers ensures that the killer is "not really suffering."[2] 3 VD 1532-33. Compare this response to juror Noad Vickery, about whom Miller-El exhausts several pages in his instant application in an attempt to analogize the two jurors. *See* App. for COA, pp. 67-71. The two jurors could not be more opposite. For example, in contrast to Mr. Warren's critical assessment about the death penalty, when Mr. Vickery was asked whether he had a personal feeling one way or the other about the death penalty, Vickery responded in a utilitarian, social context stating, "I guess the death penalty probably serves a purpose." 4 VD 1574.

Another example of Mr. Warren's skeptical approach to the law occurred when he was asked about his position on the death penalty. Mr. Warren stated, "My personal position on the death penalty, there are some cases where I would agree, you know, and there are others that I don't." These morals-based, value-laden statements

[2] Miller-El compares this retributive sentiment with juror Duke, who stated that "[t]he death penalty would be better to me than life in prison, because that is like dieing [sic] every day," and juror Jenkins who stated, "I think a harsher treatment is life imprisonment with no parole." 3 VD 1074. These two comments indicate a willingness to assess the death penalty for humane purposes, rather than Warren's "live and suffer" retributive, vindictive-centered approach. Whether these differences lead to a better or worse State's juror is not the point. The point being made is that, despite Miller-El's attempt to analogize certain jurors' testimony with the *Batson* jurors, related concepts do not imply that the compared jurors are "similarly-situated." Nor does it lead to a conclusion that one dismissal is pretextual when other jurors give similar content-related responses, because, often, it can be demonstrated that those responses come from philosophically-different stances that are relevant in a peremptory situation.

indicate some second-guessing as to the appropriateness of the law as written, and a possible hesitancy to follow the law as written. Contrast Warren's skepticism with the total legal deference and acceptance of the written law by juror Noad Vickery. When asked about his feelings on the death penalty, Mr. Vickery responded:

> The laws, as you explain it to me, are written and I agree that I would have to say yes to either three questions or whatever you said, but I still feel like that I don't write the law and I don't say where the Defendant gets the death penalty or not in one sense. I mean, the law says — whatever my decision is, then the law says what happens, not I.

4 VD 1571.

This testimony indicates a person who is completely willing to accept the law as written, without any personal, moral interjection. In his attempt to analogize the two jurors, Miller-El cites Mr. Vickery's testimony in answering a hypothetical question asking him to assume he is governor for a day and questioning whether he would abolish the death penalty. Here, Mr. Vickery, given the hypothetical authority to change the law, candidly stated he was not sure what he would do. This is in contrast, though, to his responses to questions directly pertaining to how he felt as a potential juror in a capital murder case. In the role of potential juror, Mr. Vickery stated that, despite a personal belief that a person should be spared, he would answer the special issues as the evidence warranted. 4 VD 1589. Notably, although Miller-El touts Mr. Vickery as being similarly situated with juror Warren, ***the defense***

exercised one of its peremptory strikes against Mr. Vickery.

Miller-El cites to many other jurors' testimonies regarding their beliefs on the death penalty without providing an overall context for each juror's testimony. But, it should be noted that in some of his examples, some jurors were specific on where they agreed or disagreed with the death penalty, unlike Mr. Warren's unforthcoming, blanket assessment. *See* App. for COA, p. 74 (comparing jurors Smale and Hearn who offered specific examples of where they did not feel the death penalty was appropriate).

Thus, while Miller-El uses snippets of testimony from other potential jurors in an attempt to equate them with Mr. Warren and the other *Batson* jurors, a broad, contextual review reveals moral, philosophical, and situational differences. In any case, given the evidence contained in the record, the court was not unreasonable in finding no *Batson* violation with respect to potential juror Warren due to his express, equivocal hesitation to follow the written law.

- **Edwin Rand [No. 37]**

The State justified its peremptory challenge of this juror by explaining that the juror was ambivalent about the death penalty. 4 VD 1855. As noted by the Court of Criminal Appeals, the juror responded "right now I say I can, but tomorrow I might not" when asked whether he could impose the death penalty. *Miller-El v. State*, Slip

op. at 12; 4 VD 1805. This constitutes a valid race-neutral justification for peremptorily excusing this juror.

- **Carrol Boggess [No. 40]**

The State exercised its peremptory challenge with respect to Ms. Boggess on the race-neutral justification that she was not sure whether she could assess death, and because of her continual reluctance to serve on this jury. 4 VD 2008, 2043. Furthermore, the State was concerned about the juror's prior testimony as a witness for her nephew, who was charged with theft. 4 VD 2043; PTH, Defense Ex. 7, Juror Questionnaire at 5.

Despite Miller-El's attempt to portray Ms. Boggess' hesitancy to administer a sentence of death as just an initial response that she later recanted, Ms. Boggess left the unmistakable impression throughout her voir dire that she was uncertain and hesitant about administering a death sentence. For instance, she first stated, "I wouldn't want to serve and I wouldn't want to have that responsibility to do that, but if it fell upon me, I would certainly take it and pray to the Lord to help me get through it." 4 VD 2008. Five pages of testimony later, she stated, "I'm not saying that I feel like I could impose the sentence myself — or I'm going to be imposing the sentence, is that correct?" 4 VD 2012. Two pages after that when asked whether she could vote for death, she stated, "I've never been in that situation. I don't feel like I would

want to be in that situation and whether I could do it or not, I'm not real sure." 4 VD 2014. Another two pages later, referring to an assessment of the death penalty as a "killing," Ms. Boggess stated, ". . . but now whether or not I could actually go through with murder — with killing another person or taking another person's life, I just don't know. I'd have trouble with that." 4 VD 2016. Seventeen pages of testimony later, Ms. Boggess continues asserting her hesitancy to impose a death sentence by stating that "the rule of the government should be a biblical rule and if the rules of government are not biblical, then I'm not supposed to follow that, but follow my own beliefs biblically." 4 VD 2033. And finally, on the next page of voir dire testimony, Ms. Boggess states, "The law has decided, now I'm supposed to follow the law, but only if the law states what is biblically right." 4 VD 2034.

For Miller-El to argue that Ms. Boggess only exhibited an initial hesitancy about administering a death sentence is misleading. Plus, even if Ms. Boggess interspersed occasional affirmations about answering the special issues, her testimony, at best, is equivocal. The prosecution was justified, on race-neutral grounds, in exercising a peremptory strike against this juror. More importantly, the court's decision finding Ms. Boggess' dismissal to be proper under *Batson* was reasonable because the grounds were supported by the record, clearly articulated, race-neutral, trial-related, and specific.

- **Wayman A. Kennedy [No. 43]**

The State clearly articulated its race-neutral justification that this juror believed that the death penalty should only be assessed in a mass murder situation. 5 VD 2176-2179. This constitutes a legitimate ground for peremptorily striking this juror. And the state court's determination finding no *Batson* violation here is reasonable.

Miller-El did not challenge the dismissals of the remaining four *Batson* jurors in his district court or instant petition.[3] While Miller-El goes to great lengths in an

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[3] Miller-El did not challenge the dismissals of the remaining four *Batson* jurors. But for the Court's information, a summary of the race-neutral reasons for their dismissals follows:

Linda C. Baker [No. 71]

The State's race-neutral justifications were that she did not believe in the death penalty and that she became antagonistic toward the prosecution during questioning. 8 VD 2990-91, 3018.

Janice Mackey [No. 100]

The State struck this juror because of her views on the death penalty and the fact that the juror indicated that she wanted no part of deciding whether the defendant should be executed. 10 VD 3949-3960, 4022. Even the trial court agreed that because this juror's beliefs against the death penalty were so strong, there was not even a "hint" that the State excused this juror due to race. 10 VD 4023. As the trial court observed, she was an "obviously very, very weak" juror for the State. 10 VD 4023.

Paul Bailey [No. 102]

The State exercised its peremptory challenge on this juror due to his "religious, moral, and personal views in opposition to the death penalty." BRH 25; Supp. Tr. 3. This juror was submitted for cause by the State, and the trial court held that the juror was qualified even though the trial court noted there was some question in his mind as to whether this juror indicated that he might answer the questions untruthfully so as to avoid imposing the death penalty. 11 VD 4158-59, 4167-68.

Anna L. Keaton [No. 105]

The State's race-neutral justifications were the fact that this juror was equivocal on her ability to give the death penalty, 11 VD 4319; 4326, and that because the juror's son had been involved with the criminal justice system, she would empathize with the defendant's mother, as indicated by her testimony that "he has a mother too." 11 VD 4323, 4329; 11 VD 4373.

attempt to prove unreasonableness, the record of the voir dire proceedings demonstrates that the prosecution exercised its strikes in a race-neutral manner. Because each race-neutral justification is supported by the record of the proceedings, Miller-El cannot prove the unreasonableness of the state court's findings. As stated in *Hernandez*, "where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." 500 U.S. at 369.

No. 01-7662 (5)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2001

THOMAS JOE MILLER-EL,

Petitioner,

v.

JANIE COCKRELL,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

THIS IS A DEATH PENALTY CASE.
MR. MILLER-EL IS SCHEDULED TO BE EXECUTED ON FEBRUARY 21, 2002.

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I. The Questions Presented Merit this Court's Consideration.

In a recent *en banc* decision, the Third Circuit recognized that proper analysis at the third stage of the inquiry under *Batson v. Kentucky*, 476 U.S. 79 (1986), requires consideration of *all* of the evidence, including evidence of a pattern or practice of racial discrimination. *Riley v. Taylor*, No. 98-9009, 2001 WL 1661489 (3d Cir. Dec. 28, 2001) (en banc). As highlighted by *Riley*, unquestioning deference to a trial court's determination remains a formidable obstacle to *Batson* relief, even when, as in Mr. Miller-El's case, there is unrefuted evidence of discrimination. The State in *Riley* attempted to negate strong pattern and practice evidence by elevating the importance of the individual prosecutor's credibility, and thus to effectively insulate the trial court's finding of non-discrimination from habeas review. *See id.* at *15 (the State "seems to argue that since the findings are primarily based on credibility determinations, the mere fact that [the prosecutor] testified is sufficiently probative to support [the state court findings]"). The Court resoundingly rejected this argument, emphasizing that the state courts are required to engage in the three-step *Batson* inquiry and to "*examine all of the evidence* to determine whether the State's proffered race-neutral reasons were pretextual." *Id.* at *16 (emphasis added).

Mr. Miller-El presented insurmountable and largely uncontested evidence of the Dallas County District Attorney's Office's pattern and practice of using peremptory challenges to exclude African-Americans. The District Attorney's Office promulgated a manual advising its staff to strike minority jurors, and statistical evidence shows this advice was heeded at the time of Petitioner's trial. During Petitioner's capital trial, the prosecutors used peremptory strikes to remove 90.9% of qualified African American jurors, which was consistent with the statistical evidence presented at trial that showed the Dallas County District Attorney's Office struck qualified African-Americans from capital juries at a rate of 90.3% in cases tried between 1980 and December of 1986. The prosecution shuffled Mr. Miller-El's jury panels to manipulate the

process to ensure that fewer black jurors would remain on the panel long enough to be interviewed for jury service. The jury cards filled out by prospective jurors in Mr. Miller-El's trial did not provide a blank for the jurors' races, yet the prosecutors race-coded the juror cards. Courts determined that the same prosecutors who tried Mr. Miller-El engaged in discriminatory jury selection practices in cases tried immediately before and after Mr. Miller-El's. Pet. at 7-18.[1]

The pattern and practice evidence was deemed irrelevant by the state courts, and confined to the first step of the *Batson* inquiry by the federal district court. The Fifth Circuit omitted any reference to Mr. Miller-El's pattern and practice evidence, and instead summarily deferred to the state courts' decisions. Such an analysis cannot be squared with *Riley*, or the decisions of several other circuits, *see* Pet. at 21 n.13, which require plenary consideration of all relevant evidence at the third stage of the *Baston* inquiry. The Fifth Circuit compounded its error by erroneously imposing a level of deference that far exceeds that which is called for by the AEDPA.

As Respondent's brief points out, a trial court must be able to assess the prosecutor's credibility, and such assessment may be based upon the prosecutor's "facial expressions, gestures, vocal inflection, and attitude," Opp. at 18, all of which an appellate court does not have the opportunity to observe. However, it does not follow that the trial court's evaluation of the proffered race-neutral reasons is unassailable *when such evaluation is flatly contradicted by undisputed record evidence*.[2] Contrary to Respondent's suggestion, requiring courts to consider all of the relevant evidence will not "detract[] from the ability of the trial court to make its own independent credibility determination," Opp. at 18, but rather will enhance the trial court's ability

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[1] Mr. Miller-El will cite his Petition for Writ of *Certiorari* as "Pet. at __," and appendices to his petition as "Pet. at App. __, p. __." Petitioner will cite Respondent's Brief in Opposition as "Opp. at __," and the appendices to Respondent's Opposition as "Opp. at App. __, p. __."

[2] *See Riley*, at *15-16 ("Certainly it is not required that a federal court should defer to a state court's findings of fact on habeas review as long as the state court accepted the prosecutor's race-neutral explanation, no matter how incredible, contradicted, and implausible it may be.")

to assess the genuineness of counsel's proffered reasons for a peremptory strike. "'[T]he question facing triers of fact in discrimination cases is both sensitive and difficult,'"[3] and this is no less true in the context of a trial judge faced with deciding whether a prosecutor – who may appear before that judge on an almost daily basis – engaged in discrimination. When trial courts are required to conduct decontextualized reviews of the prosecutor's proffered reasons, they are forced to decide whether the prosecutor is telling the truth or lying, as there is no other basis for the decision. Consideration of broader evidence, such as a pattern of discrimination or comparative analysis, liberates the courts by allowing a less *ad personam*, and more practical, basis for policing the system.

Petitioner's case also merits consideration because the lower court's incorrect application of 28 U.S.C. § 2254(d)(2) and § 2254(e)(1) resulted in an extraordinarily deferential standard of review, and the decisions of the lower federal courts reflect widespread disparities in the application of these provisions that can only be remedied by this Court's intervention.

II. *Batson* and its Progeny Require Consideration of All of the Evidence at the Third Stage.

A. The state courts failed to consider the totality of the evidence when determining whether the State engaged in intentional racial discrimination.

Respondent asserts that "[i]t is evident from the transcript [of the *Batson* hearing] that the trial court conscientiously applied each step of *Batson* and considered all of the evidence presented in making its ultimate determination." Opp. at 11 n.4. Thus, Respondent concludes, the trial court followed this Court's jurisprudence "to the letter." Opp. at 11. It is clear from the transcript of the *Batson* remand hearing and the trial court's findings, however, that the court consciously excluded from its consideration all of the pattern and practice evidence when deciding

[3] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 141 (2000) (quoting *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983)).

whether the prosecutors engaged in intentional discrimination, and thus failed to properly engage in the third step of the *Batson* inquiry.[4]

At the outset of the *Batson* remand hearing, the defense offered all of the evidence produced during the pre-trial *Swain* hearing. Opp. at App. A, p. 6-7. The State objected to Petitioner's offer of proof as irrelevant because it "all went to establishing past racially-based exclusion of minorities in Dallas County." The State elaborated:

> It would be our position, *even if every one of [the witnesses at the Swain hearing] had testified that no black had ever served in Dallas County in the past, that testimony, however historically and [sic] accurate it might be, would be irrelevant to the Court's inquiry of [sic] the instant case* . . . . It is not my position, necessarily, that one can no longer make out a Sixth Amendment claim by showing that kind of historical record, but it is my contention that type of historical record has no bearing on a Batson hearing and this case was remanded to this court exclusively for a Batson hearing. *At this time there is absolutely no reason for this Court to consider what may have happened in any case tried in the past in Dallas County or, for that matter, any case tried in the future after this case was tried. All those things are irrelevant and even if they could show no black ever served before or since*, in order to get a Batson remedy, they're going to have to show that in this case we struck jurors based on racial motives. If they can't do that, they will lose this hearing.

Opp. at App. A, pp. 8-10 (emphasis added). In response, defense counsel noted that *Batson* "clearly says that the defendant may rely upon any other relevant circumstances which raises [sic] an inference that the prosecutor used the selection practice to exclude veniremen from the jury on account of their race." Opp. at App. A, p. 10. "[I]n an abundance of caution," the trial court overruled the State's objection, and admitted the evidence from the pre-trial hearing. Opp. at App. A, p. 11. However, the trial court explicitly stated that it might not give the evidence any

[4] Respondent's suggestion that the trial court conscientiously applied each step of *Batson* is also contradicted by Respondent's admission that Petitioner presented a *prima facie* case of discrimination pursuant to *Batson*. Opp. at 10. The Texas Court of Criminal Appeals ("CCA") remanded Petitioner's case after holding Petitioner had established a *prima facie* case. Despite the overwhelming pattern and practice evidence, and without reference to the higher court's conclusion to the contrary, the trial court found that Petitioner had failed to establish a *prima facie* case. App. 1 at 4. The CCA subsequently reaffirmed that Petitioner had made out a *prima facie* case under *Batson*. *See* Pet. at App. 2, p. 1.

weight. *Id.* ("What weight, *if any*, I give [the evidence from the *Swain* hearing] I certainly reserve for myself . . . . Again, in an abundance of caution, I will admit the [*Swain* hearing] evidence. *Whether or not I will give it any weight is another question.*") (emphasis added).

The *Batson* remand hearing took place in one day. Opp. at App. A. At the end of the hearing, both sides presented argument and the trial court announced that it was going to "agree with [the State's] position" and asked the State to prepare proposed findings of fact. Opp. at App. A, p. 49. Whether the trial court simply signed the State's proposed findings without altering them, as it did during state post-conviction proceedings, *see* Pet. at App. 9, is not clear from the record. However, the findings mirror exactly the State's closing argument during the hearing, *see* Opp. at App. A, pp. 45-49, and there is no reference to any of the *Swain* evidence in the trial court's findings. *See* App. 1.

The findings specifically catalogued the evidence the court considered, stating "the court has considered the entire voir dire process, including the undisputed facts [regarding the race of the defendant, the racial composition of the jury, and the number of strikes the State used against African-Americans], and the explanations for the exercise of the State's peremptory challenges offered at trial and at the retrospective Batson hearing." App. 1 at 5. Because the trial court declined to consider or give any weight to the evidence adduced during the *Swain* hearing, its findings regarding the reasonableness of the State's explanations for its strikes omit any reference to the overwhelming evidence of Dallas County's pattern and practice of excluding African-Americans from juries. On appeal, the Court of Criminal Appeals summarily affirmed the trial court's findings, also without reference to the overwhelming pattern and practice evidence. Pet. at App. 2, p. 2.

Contrary to Respondent's suggestion, the record of the state court proceedings plainly demonstrates that the trial court adopted the State's position and consciously declined to consider

Dallas County's pattern and practice of using peremptory strikes to exclude African-Americans.

B. Respondent's argument that courts applying *Batson* need not address probative evidence of a prosecutor's discriminatory intent is based on a gross misreading of lower court precedent.

In *Riley*, an analytically indistinguishable case, the *en banc* Third Circuit Court of Appeals concluded that courts must consider the totality of the evidence, including pattern and practice evidence, when applying the third step in the *Batson* inquiry. *Riley*, 2001 WL 1661489 at *17. Respondent, in her Opposition, quotes extensively from the *Riley* case, *see* Opp. at 14-16, and incorrectly attributes the quotations to Chief Judge Becker's concurrence. *Id.* In fact, the quotations in Respondent's Opposition are taken from Judge Alito's dissenting opinion. *Compare id. with Riley*, 2001 WL 1661489 at *49-50 (Alito, J., dissenting). Thus, the excerpted portions of the *Riley* opinion contained in Respondent's opposition do not reflect the law in the Third Circuit.

In *Riley*, the prosecution used peremptory challenges to strike all three prospective African-American jurors. *Id.* at *4. During a post-conviction hearing, the prosecution offered facially race-neutral reasons for the strikes. *Id.* at *6. Riley presented evidence that the same prosecutor's office used "its peremptory challenges to remove every prospective black juror in the three other first degree murder trials that occurred within a year of his trial." *Id.* at *7. As in Mr. Miller-El's case, the State in *Riley* made no effort to rebut Riley's pattern and practice evidence. The hearing judge subsequently accepted the prosecution's race-neutral reasons without reference to the pattern and practice evidence, and the Delaware Supreme Court affirmed the trial court, again omitting reference to Riley's additional evidence. *Id.*

The Third Circuit held that "when we review the record at step three of the *Batson* inquiry, we must decide whether the state courts' acceptance of the State's explanation has been made after consideration of all the evidence on the record." *Id.* at *9. Because the state court did

not address Riley's pattern and practice evidence, the Third Circuit held that the "hearing judge's opinion [did] not satisfy the crucial third step of the *Batson* analysis." *Id.* at *11. Turning to the question of the level of deference due to the state court findings, the Third Circuit stated:

> Deference in a *Batson* case must be viewed in the context of the requirement that the state courts engage in the three-step *Batson* inquiry. As the Court of Appeals for the Fourth Circuit described step three: "If [the State's] burden [under step two] is met, the court then addresses and evaluates all evidence introduced by each side (including all evidence introduced in the first and second steps) that tends to show that race was or was not the real reason and determines whether the defendant has met his burden of persuasion."
>
> Here, the state courts failed to examine all of the evidence to determine whether the State's proffered race-neutral explanations were pretextual. Not only is there no indication on the record that the hearing judge engaged in the required analysis, but there is no indication that the Delaware Supreme Court did so . . . .

Id. at *16 (quoting *United States v. McMillon*, 14 F.3d 948, 953 n. 4 (4th Cir.1994)) (citations omitted). The court emphasized that its concern with the absence of any reference to Riley's evidence of systematic exclusion was not merely a formalistic matter regarding the state court opinions: "Although a judge considering a *Batson* challenge is not required to comment explicitly on every piece of evidence in the record, some engagement with the evidence considered is necessary as part of step three of the *Batson* inquiry." *Id.* at *19. "[T]he requirement that the state courts faced with a *Batson* challenge engage in the critical step three analysis is not a product of our own creativity but an accepted element of a habeas court's obligation to examine whether a defendant's constitutional right to a race-neutral jury has been infringed." *Id.* at *20.

In Petitioner's case, even more than in *Riley*, the record clearly shows that the state courts refused "to engage in the critical step three analysis," and Respondent's attempts to distinguish the instant case from *Riley* are unavailing.[5] Respondent asserts that Miller-El's *prima facie*

[5] Respondent points out that the analysis in *Riley* proceeded under the pre-AEDPA standard of review. Opp. at 14-15. This observation is irrelevant to whether courts applying *Baston* must weigh all of the evidence relevant to racial discrimination at the third step of the inquiry, as the AEDPA did not alter

evidence is weaker than that in *Riley* in that it "does little to detract from the State's peremptory justifications" and merely amounts to "historic data" and "discriminatory innuendo in establishing his *prima facie* claim." Opp. at 15. Respondent's characterization of the breadth and effect of Petitioner's evidence is grossly inaccurate. Riley's rebuttal evidence consisted solely of proof that the prosecution struck all African-Americans in the three other first degree murder cases tried in the same county during the same year. Petitioner presented evidence that Dallas County prosecutors struck 90.3% of qualified African-Americans in the fifteen capital cases tried between 1980 and December of 1986, a period of time that includes not only the year in which Petitioner was tried – 1986 – but the six preceding years. Pet. at 7-8. This evidence alone is far more probative than that adduced by Riley.

Mr. Miller-El also adduced uncontested statistical evidence that Dallas County prosecutors used peremptory challenges to remove 86% of qualified African-American jurors in non-capital felony cases, uncontested evidence that the Dallas County District Attorney's office promulgated a training manual advising prosecutors to strike minorities (and distributed this manual into the 1980s), testimony from lawyers and judges that it was common knowledge that prosecutors in Dallas County used peremptory challenges to exclude minorities, and proof that the same attorneys who prosecuted Petitioner were found to have discriminated in trials immediately preceding and following Petitioner's. Pet. at 7-10. Moreover, in addition to striking death-qualified African-Americans, the prosecution engaged in other racially discriminatory practices during Mr. Miller-El's trial, including "shuffling" the venire in an effort to prevent African-

this Court's Equal Protection jurisprudence. Respondent's attempts to distinguish Petitioner's case from decisions in other circuits holding that courts must consider all relevant evidence at the third stage of the *Baston* inquiry, *see id.* 16 n.6, are similarly unpersuasive. Whether a *Batson* claim is decided on direct appeal or during habeas proceedings, and whether the pre- or post-AEDPA version of 28 U.S.C. § 2254 applies, the required three-step analysis remains the same. Even after the AEDPA, federal courts retain the authority in habeas corpus proceedings to enforce this Court's Equal Protection jurisprudence. *See, e.g., McClain v. Prunty*, 217 F.3d 1209 (9th Cir. 2000).

Americans from serving and engaging in racially disparate questioning on the issue of a potential juror's ability to assess the minimum punishment. Pet. at 10-18. This evidence is not merely "discriminatory innuendo" which establishes Petitioner's *prima facie* case, Opp. at 15, but rather probative evidence that should have been considered at the third step when assessing the genuineness of the prosecutors' proffered race-neutral reasons. *See* Pet. at 18-21, 24-28.

The state courts plainly refused to engage Mr. Miller-El's evidence of Dallas County's pattern and practice of systematically excluding African-Americans from juries, and the lower federal courts confined the relevance of this evidence to the issue of whether Mr. Miller-El had made out a *prima facie* case. The refusal of the state courts, and the courts below, to consider all of the relevant evidence during the third stage of the *Baston* inquiry was unreasonable in light of this Court's established Equal Protection jurisprudence.

C. Petitioner does not seek the application of a new rule, but merely seeks enforcement of this Court's precedent.

Respondent asserts that Petitioner seeks a new rule imposing shifting levels of scrutiny at the third stage of the *Batson* inquiry. Opp. at 13, 17-19. This is a misstatement of Petitioner's argument. Petitioner is not advocating for the creation of a novel scheme in which differing tests are applied at the third step of the *Batson* inquiry, but simply seeks a straightforward application of *Batson*, in which the courts actually engage in the third step and weigh all of the evidence when deciding whether he has met his burden of demonstrating intentional racial discrimination.

As Respondent notes, this Court has observed that "[i]n the *typical* peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercised the challenge." *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (emphasis added); *see* Opp. at 18. However, this is not a typical case because there is voluminous pattern and practice evidence relevant to

whether the prosecutor's race-neutral explanation should be believed. Respondent's suggestion that consideration of pattern and practice evidence would "improperly penalize[] those defendants who do not have the advantage of historic discrimination to pad their *prima facie* claim," Opp. at 17, is simply unsupportable.

This Court has unambiguously held that courts applying *Batson* must consider the totality of the circumstances at the third step when deciding whether the race-neutral reason should be believed, and that significant pattern and practice evidence is probative of racial discrimination. *See Hernandez*, 500 U.S. at 369 (pattern and practice evidence may render "a finding of no discrimination . . . simply too incredible to be accepted"); *id.* at 374 (O'Connor, J., concurring) ("Disproportionate effect may, of course, constitute evidence of intentional discrimination. The trial court may, because of such effect, disbelieve the prosecutor and find that the asserted justification is merely a pretext for intentional race-based discrimination.").

To date, no court reviewing Mr. Miller-El's case has considered all of the relevant evidence at *Batson*'s third stage. The overwhelming evidence of a pattern and practice of racial discrimination in Dallas County demonstrates that the fact that the prosecutors excluded 90% of the qualified African-American jurors from Petitioner's trial is more plausibly explained by the Dallas County policy of removing minority jurors and the prosecutors' documented, contemporaneous jury selection practices than it is by their proffered race-neutral reasons. When purported race-neutral reasons are proffered in the context of such strong, undisputed evidence of a pattern and practice of discriminatory behavior, courts engaging in the third step of the *Batson* inquiry should necessarily greet the proffered reasons with greater skepticism than would be warranted in cases in which no such evidence is presented.

Finally, the assertion that Petitioner seeks a new rule is contradicted by the numerous decisions of lower courts that have been compelled by this Court's Equal Protection jurisprudence

to conduct a meaningful assessment of all of the evidence relevant to discriminatory intent at the third stage of the *Batson* inquiry. *See* Pet. at 20-21 & n.13.

III. 28 U.S.C. § 2254(d) Does Not Impose a Bar to Granting Relief to Petitioner.

A. 28 U.S.C. § 2254(d) authorizes relief on Petitioner's *Batson* claim.

Respondent argues that relief is barred in this case because the post-AEDPA standard of review applies to Petitioner's *Batson* claim. Opp. at 14-15, 16 n.6, 19-20. As Mr. Miller-El argued in the courts below, neither § 2254(d)(1) nor § 2254(d)(2) bar relief in this case.

1. The state court decision was an unreasonable application of this Court's *Baston* jurisprudence.

A state court decision is unreasonable under § 2254(d)(1) if the court ignored or discounted evidence plainly relevant to its determination. *See (Terry) Williams v. Taylor*, 529 U.S. 362, 416 (2000) (O'Connor, J., joined by Kennedy, J., concurring). In *Williams*, Justice O'Connor noted that the Virginia Supreme Court's dismissive treatment of what was in reality a very powerful claim "reveal[ed] an obvious failure to consider the *totality* of the omitted mitigation evidence," and that this "obvious failure" to genuinely assess the evidence rendered the Court's application of the law to the facts "unreasonable." *Id.* In the instant case, the CCA's decision on the merits of the *Batson* claim – which is relegated mostly to an appendix attached to its unpublished opinion – reveals precisely the same flaw. The *Batson* inquiry, like the *Strickland* inquiry, calls for a consideration of the "totality" of the evidence tending to prove discrimination. Such consideration is glaringly absent from the CCA's opinion. Like the federal magistrate judge, the CCA focused solely on whether the prosecution had been able to advance facially race-neutral reasons for its strikes, and prematurely ended its inquiry there. Nowhere did the CCA engage the overwhelming additional pattern and practice evidence bearing on the prosecutors' intent. *See supra* at 8-9. The state court's failure to consider the "totality of the evidence" was clearly an unreasonable application of this Court's established Equal Protection jurisprudence.

2. The state court resolution of the *Batson* claim was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

The refusal of the state courts to consider Dallas County's pattern and practice of using peremptory challenges to exclude African-Americans was also, under § 2254(d)(2), an unreasonable determination of the facts in light of the evidence presented to the state courts. As Respondent notes, both of Petitioner's claims before this Court involved outcome-determinative findings of fact. Opp. at 8. Resolution of Petitioner's *Batson* claim turns ~~on the fact~~ finding made at the third step of the *Batson* inquiry. Given the abundant pattern and practice presented by Mr. Miller-El, and the established Equal Protection jurisprudence dictating that such evidence is relevant to *Batson*'s third stage, the state court surely was required to actually consider Mr. Miller-El's evidence in order to render a reasonable "determination of the facts *in light of the evidence presented in the State court proceeding*." *See* 28 U.S.C. § 2254(d)(2) (emphasis added). Here, the state court record and opinions reflect that the courts adopted the prosecution's position that pattern and practice evidence is simply irrelevant to the *Batson* inquiry.[5] *See supra* at 4-5. The state court's finding that the prosecutors did not engage in racial discrimination during Petitioner's trial was made only after turning a blind eye to overwhelming evidence to the contrary, which was plainly unreasonable.

B. 28 U.S.C. § 2254(d) authorizes relief on Petitioner's competency claim.

Respondent, without ever alluding to the *ex parte* manner in which the trial court accepted and adopted *in toto* the prosecutor's proposed findings of fact, asserts that the state court

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[5] The State took the extreme position that even if pattern and practice evidence demonstrated that the Dallas County District Attorney's Office had excluded African-Americans from serving on all Dallas County juries in the past, this information would be irrelevant to the *Batson* inquiry. Opp. at App. A, p. 8-9; *see supra* at 4.

determination of Mr. Miller-El's competency-to-stand-trial claims[6] was reasonable. Opp. at 22-26. The State court, however, resolved Mr. Miller-El's claims by ignoring the evidence proffered by Mr. Miller-El, as well as the serious deficiencies in the affidavit submitted by the State's purported expert.

Petitioner's argument is not predicated solely on the fact that the trial court's findings fail to mention Petitioner's evidence in support of his claims. *See* Opp. at 22. The flaw in the state court findings is not one of mere omission. Rather, the findings, which were prepared by the prosecution, affirmatively stated that Mr. Miller-El presented the state courts "nothing to show that any evidence presently exists of applicant's alleged incompetency."[7] Pet. at App. 3, p. 7. This language confirms that the absence of any reference in the findings to Petitioner's evidence reflects not just a failure to mention all of the evidence, but a failure to *consider* all of the relevant evidence. In fact, Petitioner presented the affidavit of a medical expert – supported by voluminous medical records – who concluded that Mr. Miller-El was incompetent to stand trial. *See* Pet. at 38-39.

The state courts' failure to consider all of the evidence presented by Petitioner "resulted in a decision that was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2).

IV. Respondent's Suggested Reading of 28 U.S.C. § 2254(d)(2) and § 2254(e)(1) Conflicts with the Fifth Circuit's Decision in this Case – and Others – as Well as the Decisions of Other Circuits.

Although Respondent purports to defend the Fifth Circuit's application of § 2254(d)(2)

[6] Mr. Miller-El sought relief based on his incompetence to stand trial and the trial court's failure to conduct a hearing *sua sponte* regarding Mr. Miller-El's competency to stand trial.

[7] Similarly, although the trial court made three separate requests during the trial that Petitioner be evaluated by a doctor, the last of which was specifically for ascertaining Mr. Miller-El's fitness to attend court, the prosecution's findings stated that there was no *bona fide* doubt as to Petitioner's competence to stand trial. Pet. at 39.

and § 2254(e)(1) to Petitioner's case, Opp. at 26, Respondent suggests an analysis different from the court's and wholly fails to discuss or defend the standard applied to Petitioner's case by the court of appeals. Opp. at 26-30.

Instead of suggesting, as the lower court did, that habeas petitioners be required to show that state court fact findings are unreasonable, and prove the unreasonableness by clear and convincing evidence, Respondent suggests that courts should first apply the § 2554(e)(1) presumption of correctness, and only if a petitioner can overcome the presumption of correctness should courts then address the § 2254(d)(2) inquiry. Opp. at 27-30. In a case such as this, which both parties agree turns on outcome-determinative fact findings, this approach makes no sense. When a petitioner demonstrates by clear and convincing evidence that the prosecution engaged in intentional racial discrimination, he or she should be entitled to relief. *See e.g. Gardner v. Johnson*, 247 F.3d 551, 559 n.31 (5th Cir. 2001) (analogizing "unreasonableness" to a "clear error" standard).

Nor is Respondent's argument supported by her citation to *Valdez v. Cockrell*, 274 F.3d 941 (5th Cir. 2001). *See* Opp. at 30. In *Valdez*, the majority harmonized § 2254(d)(2) and § 2254(e)(1) as follows:

> Whereas § 2254(d)(2) sets out a general standard by which the district court evaluates a state court's specific findings of fact, § 2254(e)(1) states what an applicant will have to show for the district court to reject a state court's determination of factual issues. For example, a district court may find by clear and convincing evidence that the state court erred with respect to a particular finding of fact, thus rebutting the presumption of correctness with respect to that fact. *See* § 2254(e)(1). It is then a separate question whether the state court's determination of facts was unreasonable in light of the evidence presented in the state court proceeding. *See* § 2254(d)(2). Thus, it is possible that, while the state court erred with respect to one factual finding under § 2254(e)(1), its determination of facts resulting in its decision in the case was reasonable under § 2254(d)(2).

Id. at 951 n.17. As is clear from the above excerpt, the *Valdez* majority held that § 2254(d)(2)

requires a separate inquiry, but did not hold that satisfying the § 2254(e)(1) inquiry was a prerequisite to relief under § 2254(d)(2). Pursuant to *Valdez*, it is equally possible that a state court was correct in its determination of a specific fact under § 2254(e)(1), but that the determination of the facts *resulting in its decision* was unreasonable in light of the evidence presented to the state court, warranting relief under § 2254(d)(2).

Respondent cannot point to a clear line of authority in the Fifth Circuit which dictates how to apply the two provisions, because panels of the Fifth Circuit are in disarray over the issue. *See* Pet. at 35-36. Even if Respondent's analysis was the clearly preferred approach of the Fifth Circuit, and the court had actually applied the analysis in this case, this approach – in addition to leading to the anomalous result that a petitioner is not entitled to relief despite demonstrating an Equal Protection violation by clear and convincing evidence – conflicts with that of the Ninth Circuit. *See Torres v. Prunty*, 223 F.3d 1103, 1110 n.6 (9th Cir. 2000) (satisfying § 2254(d)(2) negates the § 2254(e)(1) presumption of correctness).

CONCLUSION

Respondent asserts that Petitioner raises the confusion regarding the application of § 2254 in an attempt to prevent his execution. Opp. at 30. Even after the enactment of the AEDPA, petitioners are entitled to "meaningful federal court review of the evidentiary record considered by the state courts."[8] At issue here is whether Petitioner is entitled to meaningful review of the overwhelming evidence of intentional racial discrimination that the state courts refused to consider. For the reasons set forth above, Petitioner THOMAS JOE MILLER-EL respectfully prays that this Court grant his petition for a writ of *certiorari*.

Respectfully Submitted,

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[8] *Beck v. Bowersox*, 257 F.3d 900, 901 (8th Cir. 2001) (discussing § 2254(d)(2) and § 2254(e)(1)).

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2001

THOMAS JOE MILLER-EL,

Petitioner,

v.

JANIE COCKRELL,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

CERTIFICATE OF SERVICE

I, Jim Marcus, hereby certify that true and correct copies of Petitioner-Appellant's Reply to Respondent's Brief in Opposition, and Petitioner-Appellant's Appendix to the Reply to Respondent's Brief in Opposition, were served on counsel for Respondent-Appellee on this 23rd day of January 2002, via First Class United States Mail, addressed to:

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NO. 8668-NL

THE STATE OF TEXAS	§	IN THE CRIMINAL
VS.	§	DISTRICT COURT NO. 5
THOMAS JOE MILLER-EL	§	DALLAS COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW
UPON REMAND FROM THE COURT OF CRIMINAL APPEALS

I.

PROCEDURAL HISTORY LEADING TO REMAND

Thomas Joe Miller-El, hereinafter referred to as "Defendant," was charged by indictment with capital murder. Following jury voir dire conducted in February and March of 1986, the Defendant was found guilty of capital murder and sentenced to death. The Defendant appealed his conviction to the Court of Criminal Appeals, raising inter alia, a claim that the prosecutors who selected the jury in the instant case violated the principles enunciated in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1722, 90 L.Ed.2d 69 (1986).

On March 3, 1988, the Court of Criminal Appeals returned an opinion which abated the appeal to this court with instructions to "conduct further proceedings not inconsistent with this opinion and Batson" and to forward the record of those proceedings and Findings of Fact and Conclusions of Law to the Court of Criminal Appeals. Opinion of March 3, 1988, 748 S.W.2d 459,461.

The State filed a motion for rehearing which was denied by the Court of Criminal Appeals on April 27, 1988. In the interim, the Court of Criminal Appeals had decided Keeton v. State, 749 S.W.2d 861 (Tex. Crim. App. 1988) (opinion following abatement).

Accordingly, in its opinion of April 27, 1988, denying the State's motion for rehearing, the Court of Criminal Appeals stated:

> This appeal is abated to the trial court with instructions that it conduct a hearing pursuant to the full procedure and steps outlined in Keeton v. State . . .
> Order of 4/27/88.

Because the State's Motion for Rehearing sought to clarify the issue of whether this court could determine whether a prima facie case of purposeful discrimination had been established by the Defendant, this Court deems the use of the phrase "full procedure and steps outlined in Keeton" in the order of April 27, 1988 to have added significance[1] and has interpreted the use of this phrase to mean that this Court is to perform all the prongs of the analysis set out in Keeton.

II.

THE RETROSPECTIVE BATSON HEARING

On May 10, 1988, this court conducted a hearing on the Batson issues. At that time, the court noted that certain facts were not in dispute or could be stipulated by the parties. S.F. 4-15.[2]

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[1]It may be that the Court of Criminal Appeals' original opinion ordering a remand to this court also authorized this court to make the prima facie case determination:

> However, it is not for this Court to say whether there was any racial motivation in the prosecutor's actions. Batson requires such a determination being made by the trial court.
> Miller-El, supra, at 460 .

[2]The court reporter's transcription of this hearing has been typed. It is referred to throughout this set of Findings as: S.F. ___.

This Court withheld its rulings on the prima facie showing issue and, without objection from either party, asked the State to produce its reasons for striking the ten black veniremen. S.F. 15-16.

The State then called Mr. Paul Macaluso, an assistant United States attorney, who, at the time of trial, was the Dallas County Assistant District Attorney in charge of the State's voir dire in the instant case. S.F. 17-18;20-21.

Mr. Macaluso then testified concerning the reasons that the State had exercised peremptory challenges against venireman, No. 102, Paul Bailey. S.F. 21-26. Basically, he testified that he exercised peremptory challenge against Bailey due to the opposition to the death penalty which Bailey had expressed in jury questionnaires and during voir dire. He also testified that race played no part in his decision to strike Bailey.

Mr. Macaluso also testified concerning the State's reasons for striking Venireman Joe Warren. S.F. 26-33. In sum, these reasons included the fact that Warren's brother was a convicted felon, that Warren had given what the State regarded to be inconsistent responses to questions during voir dire regarding the death penalty, and certain answers concerning an incident involving Warren's son. All of these factors led the prosecutors to conclude that Warren would not be a juror favorable to the State. Race played no part in deciding to strike Warren.

The court indicated that it would consider the reasons provided by the State at trial for striking of the other eight black veniremen. S.F. 16;34;44-45.

III.

UNDISPUTED FACTS AND LEGAL ISSUES

The following facts, which are relevant to the Batson issues before this court, are not disputed:

1) The Defendant is black, and, therefore, he is a member of a "cognizable racial group" for purposes of Batson.

2) That jury voir dire occurred in February and March of 1986, well before the return of the Supreme Court's opinion in Batson.

3) That during the course of the individual voir dire process, the State exercised 14 of its 15 peremptory challenges.

4) That the State exercised 10 of these 14 peremptory challenges against veniremen of the Defendant's race.

5) That six other black veniremen were excused by the agreement of the parties.

6) That the jury selected and impaneled had nine white jurors, one Hispanic juror, one black juror, and one Filipino juror.

IV.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DISPUTED ISSUES

A. Prima Facie Case

At the time of the trial in this case, this court was convinced that none of the State's peremptory challenges were made for race-related reasons. The court remains convinced that this is true, and holds that the evidence did not even raise an inference of racial motivation in the use of the State's peremptory challenges. While it is true that the State used 10 of its 14 peremptory challenges against black veniremen, it is also true

that one black venireman did serve on the jury. However, such raw numbers, while instructive, are not the sole basis for this court's holding; rather, the court has considered the entire voir dire process, including the undisputed facts set forth in Part III, supra, and the explanations for the exercise of the State's peremptory challenges offered at trial and at the retrospective Batson hearing. In this regard, this Court has considered the procedure outlined by the Supreme Court of Missouri in State v. Antwine, 743 S.W.2d 51 (Mo. banc 1987), an opinion quoted extensively by the Court of Criminal Appeals in its opinion in Keeton v. State, supra. See, 749 S.W.2d at 865-66. In Antwine, the Court stated:

> As a practical matter, the third element of the prima facie case under Batson -- "facts and any other relevant circumstances raise an inference that the prosecutor used [his peremptory challenges] to exclude the veniremen from the petit jury on account of their race" -- requires the trial court to consider the State's explanation of the manner in which it employed its challenges prior to making a final determination as to whether a prima facie case exists. We must therefore direct our trial judges to consider the prosecutor's explanations as part of the process of determining whether a defendant has established a prima facie case of racially discriminatory use of peremptory challenges.

Antwine, 743 S.W.2d at 64.

B. Reasonableness of the State's Explanations

Because this court does not wish to unduly delay the progress of the appeal of this case, it required the State to produce explanations for the exercise of all of her peremptory challenges, notwithstanding the court's belief in the correctness of its ruling on the prima facie showing issue.

The Court has considered the reasons given at trial and those offered at the hearing on remand. As to the ten black veniremen in question, the Court makes the following Findings of Fact and Conclusions of Law:

1. The Court finds that the prosecutor came forward with a neutral explanation for each of the State's peremptory challenges of a venireman of the Defendant's race.

2. The Court finds that the explanations given by the prosecutor in each case were completely credible.

3. The Court finds that explanations given by the prosecutor as to each venireman were completely sufficient as to content.

4. The Court finds that none of the explanations given by the prosecutor were based on a group trait which was not shown to apply to the challenged veniremen specifically.

5. The Court finds that none of the veniremen in question were examined only perfunctorily by the prosecutors.

6. The Court finds that no disparate prosecutorial examination of any of the veniremen in question has been shown.

7. The Court finds that the primary reasons for the exercise of the challenges against each of the veniremen in question, their

reluctance to assess or reservations concerning the imposition of the death penalty, were closely and directly related to the facts of the case, insofar as this was a death penalty case.

8. The Court finds the other factors cited by the prosecutors were reasonably related to the facts of the case.

9. The Court finds that there has been no showing by the Defendant of disparate treatment by the prosecutor of the black veniremen in question versus non-black veniremen, where there was a difference between the responses given by veniremen who were and who were not challenged by the State.

10. The Court finds that there was no purposeful discrimination by the prosecutor in the use of his peremptory strikes.

SIGNED THIS 13 day of January 1988.

PAT McDOWELL, Judge
Criminal District Court No. 5
Dallas County, Texas

No. 01-7662

In The
Supreme Court of The United States

THOMAS JOE MILLER-EL,
Petitioner,

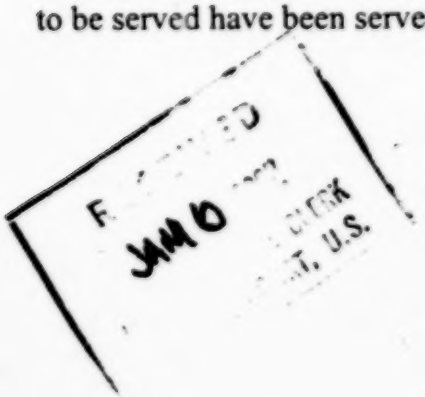
v.

JANIE COCKRELL, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent.

On Petition For Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit
and on Application for Stay of Execution

PROOF OF SERVICE

I hereby certify that on the 11th day of January, 2002, one copy of Respondent's Brief in Opposition was mailed, postage prepaid, to Jim Marcus and Elizabeth Detweiler, TEXAS DEFENDER SERVICE, 412 Main Street, Suite 1150, Houston, Texas 77002. All parties required to be served have been served. I am a member of the Bar of this Court.



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(6)

Supreme Court, U.S.
FILED
MAY 28 2002
OFFICE OF THE CLERK

No. 01-7662

IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,
Petitioner,

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX VOLUME I OF II

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CERTIORARI GRANTED FEBRUARY 15, 2002

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A. Direct Appeal—CCA #69,677, Dist Ct. #F85—78668

No.	Court	Document	Date
1	CCA	1st Motion for Extension of Time in Which to File Appellant's Brief	12/19/86
2	CCA	Order extending time to 2/2/87	12/23/86
3	CCA	2nd Motion for Extension of Time in Which to File Appellant's Brief	2/2/87
4	CCA	Order extending time to 3/15/87	2/3/87
5	CCA	Motion requesting extension	
6	CCA	order extending time to 4/15/87	3/11/87
7	CCA	Motion for Extension of Time in Which to File Brief	4/15/87
8	CCA	Order extending time to 4/27/87	4/15/87
9	CCA	Brief for the Appellant	4/27/87
10	CCA	Motion to Extend Page Limitation of Brief	4/27/87
11	CCA	1st State's Motion to Extend the Time for Filing the State's Brief	5/19/87
12	CCA	Order extending time to 7/26/87	5/19/87
13	CCA	State's Motion to Extend the Time for Filing the State's Brief	7/27/87
14	CCA	Order extending time to 8/31/87	7/27/87
15	CCA	State's Motion to Extend the Time for Filing the State's Brief	8/31/87
16	CCA	Order extending time to 10/15/87	9/1/87
17	CCA	State's Motion to Extend the Time for Filing the State's Brief	10/15/87
18	CCA	Order extending time to 10/25/87	10/15/87
19	CCA	Cover Letter for State's Brief (Not attached	10/23/87
20	CCA	Letter noting receipt of Court's order extending time to 1/27/88 and Order extending time	11/4/87
21	CCA	Letter, defense attorney, requesting oral argument	11/25/87
22	CCA	opinion, abating appeal	3/3/88

No.	Court	Document	Date
23	CCA	State's Motion for Rehearing (Seeking Modification of the Court's Order of Remand's Delivered March 3, 1988)	3/17/88
24	CCA	State's Motion for Leave to File MRH denied; abated to TC	4/27/88
25	CCA Notice	Supplemental Statement of Facts was received and filed	7/5/89
26	CCA	opinion, Affirmed	9/16/92
27	CCA	Motion to Extend the Time for the Filing of a Motion for Rehearing	10/8/92
28	CCA	Order extending time to 10/30/92	10/8/92
29	CCA	Motion to Extend the Time for the Filing of a Motion for Rehearing	11/03/92
30	CCA	Order extending time to 11/30/92	11/3/92
31	CCA	Motion for Leave to File and Motion for Rehearing	11/30/92
32	CCA	Order extending time to 12/8/92	12/8/92
33	CCA	Mandate	2/5/93
34	CCA	Shuck Cover	
35	Crim. Dist. Ct. No. 5, Dallas Cty	Order Modifying Execution Date	2/7/94
36	Crim. Dist. Ct. No. 5, Dallas County	Order Modifying Execution Date and Appointing counsel	7/18/94
37	CCA	Order Modifying Execution Date	9/20/94
38	Crim. Dist. Ct. No. 5, Dallas Ctt t	Order Setting Execution Date	10/5/2001

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS (DALLAS)

[FILED 07/16/96]

CIVIL DOCKET FOR CASE H: 96—CV—1992

THOMAS JOE MILLER—EL,
Petitioner,
v.
JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
7/16/96	1	APPLICATION by plaintiff Thomas Joe Miller—E1 for Stay of Execution (15+). 0 (amy) [Entry date 07/17/96]
7/16/96	1	MOTION by plaintiff Thomas Joe Miller—E1 for appointment of counsel (15+), (amy) [Entry date 07/17/96]
7/16/96	2	MOTION by plaintiff Thomas Joe Miller—E1 to proceed in forma pauperis (3), (amy) [Entry date 47/17/96]
7/16/96	3	Statement of Willingness to Accept Ap—pointment by movant Mandy Welch, movant Gregory W Wiercioch, movant James Marcus (5). (amy) [Entry date 07/17/96]

DATE	NO.	PROCEEDINGS
7/16/96	—	PRELIMINARY ASSIGNMENT TO Magistrate Judge Jeff Kaplan (amy) [Entry date 01/17/96]
7/17/96	4	ORDER granting [1-1] application for stay of execution. The execution date of 7/30/96 is hereby stayed; Mandy Welch director of the Texas Defender service is appointed for Mr. Miller-E1 ; a Texas Defender Service Staff Attorney, designated by Me Welch will enter an appearance as attorney-in-charge within 10 days of the date of this order; appointed counsel is granted 120 days from the date of this order within which to file a petition for writ of habeas corpus on behalf of the plaintiff (signed by HBS) copies to counsel; 7/17/96 FAXED Page(s) 2 (amy)
7/17/96	5	ORDER granting [2-1] motion to proceed in forma pauperis (signed by H85) Copies to counsel: 7/17/96 FAXED Page(s) 1 (amy)
7/23/96	6	MOTION by Thomas Joe Miller-El for Jim Marcus to appear pro hac vice (4) (bjj) [Entry date 07/24/96]
7/23/96	7	ORDER granting [6-1] motion for aim Marcus to appear pro hac vice (signed by Judge Sanders) Copies to counsel: 7/24/96 Page(s) 1 (bjj) [Entry date 07/24/96]
7/23/96	8	MOTION by defendant Director TDCJ for reconsideration of [4-2] order granting petitioner 120 days in which to file his Federal Habeas Petition (15+) (lch) [Entry date 07/24/96]

DATE	NO.	PROCEEDINGS
7/23/96	9	NOTICE of attorney appearance for plaintiff Thomas Joe Miller-E1 by Gregory William Wiercioch, Jim Marcus (2) (lch) [Entry date 07/24/96]
7/24/96	10	NOTICE of Intent to Respond by plaintiff Thomas Joe Miller-E1 (2) (tsp) [Entry date 07/25/96]
7/24/96	11	ORDER Response to motion reset to 8/6/96 for (8-1) motion for reconsideration of [4-2] order granting petitioner 120 days in which to file his federal Habeas Petition (signed by Judge Sanders) Copies to counsel: 7/25/96 Page (s) 1 (lmn) [Entry date 07/25/96]
6/6/96	12	RESPONSE by plaintiff Thomas Joe Miller-El to [8-1] motion for reconsideration of [4-2] order granting petitioner 120 days in which to file his Federal Habeas Petition (15+) (wcc) [Entry date 08/07/96]
8/12/96	13	ORDER granting [8-1] motion for reconsideration of [4-2] order granting petitioner 120 days in which to file his Federal Habeas Petition the petition will be due 10/21/96 (signed by HBS) Copies to counsel: 08/13/96 Page(s) 1 (wcc) [Entry date 08/13/96]
9/20/96	14	EX PARTE SEALED MOTION (svc)
9/26/96	15	SEALED DOCUMENT placed in sealed area (wcc) [Entry date 09/27/96]
10/9/96	17	MOTION by plaintiff Thomas Joe Miller-E1 to extend time to file petition for writ of HC (6) (wcc) [Entry date 10/15/96]

DATE	NO.	PROCEEDINGS
10/10/96	16	ORDER . . . granting petr's mot for ext of time to file petition for writ of HC Granted (signed by hbs) Copies to counsel: 10.10.96 Page(s) 1 (wcc)
11/1/96	18	SEALED EX PARTE DOCUMENT placed in sealed area (klm)
11/1/96	19	MOTION by plaintiff Thomas Joe Miller-E1 to extend time to file Petition for Writ of Habeas Corpus (15+) (klm)
11/1/96	21	ORDER . . . petition for writ of HC must be filed by noon 12/13/96 (signed by HBS) Copies to counsel: 11.06.96 Page(s) 1 (wcc) [Entry date 11/06/96]
11/5196	20	Request by plaintiff Thomas Joe Miller-El for Court to take judicial notice of Fifth Circuit opinion (15+) (wcc) [Entry date 11/06/96]
11/5/96	22	ORDER Response to motion reset to 12:00 11/19/96 for (19-11 motion to extend time to file Petition for Writ of Habeas Corpus (signed by HBS) Copies to counsel: 11.06.96 Page(s) 1 (wcc) [Entry date 11/06/96]
11/14/96	23	RESPONSE by defendant Director TDCJ in opposition to (19-11 motion to extend time to file Petition for Writ of Habeas Corpus (10) (k1m)

DATE	NO.	PROCEEDINGS
11/15/96	24	MOTION by plaintiff Thomas Joe Miller-El for leave to file Reply to respondent Johnson's opposition to petitioner's motion for extension of time to file federal Habeas Petition 3) (wcc)
11/20/96	25	ORDER denying [19-1] motion to extend timeto file Petition for Writ of Habeas Corpus (signed by HBS) copies to counsel: 11.20.96 Page(s) 1 {wcc)
11/25/96	26	SEALED DOCUMENT placed in sealed area (wcc) [Entry date 11/26/96]
12/12/96	27	SEALED DOCUMENT placed in sealed area (ldm) [Entry date 05/06/97]
3/4/97	28	MOTION by plaintiff Thomas Joe Miller-E1 for leave to file Petition for Writ of He within statutory one year deadline (15+) (wcc) [Entry date 03/05/97]
3/5/97	29	ORDER Response to motion reset to 12:00 3/14/97 for (28-11 motion for leave to file petition for Writ of HC within statutory one year deadline (signed by HBS) Copies to counsel: 03.05.97 Page(s) 1 (wcc)
3/10197	30	ORDER . . . vacating order of 11/1/96 pending a ruling on motion for extension of statutory one year deadline HC (signed by HBS) Copies to counsel: 03.10.97 Page(s) 1 (wcc)
3/10/97	31	RESPONSE by defendant Director TDCJ in opposition to (28-1) motion for leave to file Petition for Writ of HC within statutory one year deadline (5) (wcc)

DATE	NO.	PROCEEDINGS
3/11/97	32	MOTION by plaintiff Thomas Joe Miller-El for leave to file reply to respondent's opposition to petitioner's motion for leave to file petition for writ of HC within statutory one-year filing deadline (10) (wcc) [Entry date 03/12/97]
3/13/97	33	ORDER granting [32-1] motion for leave to file reply to respondent's opposition to petitioner's motion for leave to file petition for writ of HC within statutory one-year filing deadline (signed by HBS) Copies to counsel: 03.14.97 Page(s) 1 (wcc) [Entry date 03/14/97]
3/13/97	34	RESPONSE by plaintiff Thomas Joe Miller-El in opposition to [31-1] opposition response (7) (wcc) [Entry date 03/14/97]
3/14/97	35	ORDER granting [28-1] motion for leave to file petition for Writ of HC within statutory one year deadline; due 06.17.97 (signed by HBS) copies to counsel: 03.14.97 Page(s) 1 (wcc)
4/10/97	36	SEALED DOCUMENT placed in sealed area (ldm) [Entry date 05/08/97]
4/11/97	37	MOTION by plaintiff Thomas Joe Miller-El for leave to file Petition for writ of HC before 04.24.97 with leave to file amended original petition by 06.17.97 (8) (wcc)

DATE	NO.	PROCEEDINGS
4/11/91	38	ORDER Response to motion reset to 12:00 4/18/97 for (31-13 motion far leave to file Petition for Writ of He before 04.24.97 with leave to file amended original petition by 06.17.97 (signed by HBS) Copies to counsel: 04.14.97 Page(s) 1 (wcc) [Entry date 04/14/97]
4/15/97	39	SEALED DOCUMENT placed in sealed area (wcc) [Entry date 04/18/97]
4/18/97	40	RESPONSE by defendant Director TDCJ in opposition to [37-1] motion for leave to file Petition for Writ of HC before 04.24.97 with leave to file amended original petition by 06.17.97 (11) (wcc) [Entry date 04/21/91]
4/21/97	41	SEALED DOCUMENT placed in sealed area (wcc)
4/22/97	42	MOTION by plaintiff Thomas Joe Miller-El for leave to file reply to respondent Johnson's opposition to petitioner's motion for an order allowing petitioner to file a petition for writ of HC before 04/24/97 with leave to file amended original petition by 06/17/97 (wcc) [Edit date 05/15/97]
4/24/97	43	MOTION by defendant Director TDCJ to strike petitioner's ex parte sealed motions for investigative funds (6) (wcc)
4/28/97	44	ORDER OF USCA (certified copy) Re: The petition for writ of mandamus is DENIED, (2) cc to judge. (st) [Entry date 04/29/7]

DATE	NO.	PROCEEDINGS
9/30/97	45	RESPONSE by plaintiff Thomas Joe Miller-El to [43-1] motion to strike petitioner's ex parte sealed motions for investigative funds (15+) (wcc)
5/1/97	46	REPLY by defendant Director TDCJ to response to [43-1] motion to strike petitioner's ex parte sealed motions for investtigative funds (14) (wcc)
5/6/97	47	SEALED DOCUMENT placed in sealed area (wcc) [Entry date 05/07/97]
5/7/97	48	SEALED DOCUMENT placed in sealed area (wcc)
5/16/97	49	SUPPLEMENTAL REPLY by defendant Director TDCJ to response to [43-1] motion to strike petitioner's ex parte sealed motions for investigative funds (15) (wcc)
6/17/97	50	MEMORANDUM OPINION AND ORDER re: compensation of counsel (signed by HBS) Copies to counsel: 06.17.99 Page(s) : 4 (wcc)
6/17/97	51	PETITION for writ of habeas corpus; Date Received: 06.17.97 (5 volumes) (under separate cover) (wcc)

DATE	NO.	PROCEEDINGS
6/17/97	52	ORDER denying [42-1] motion for leave to file reply to respondent Johnson's opposition to petitioner's motion for an order allowing petitioner to file a petition for writ of HC before 04/24/97 with leave to file amended original petition by 06/17/97, denying [37-1] motion for leave to file Petition for Writ of HC before 04.24.97 with leave to file amended original petition by 06.17.97 (signed by HBS) Copies to counsel: 06.17.97 Page(s) 1 (wcc)
6/17/97	53	ORDER REFERRING CASE to Magistrate Judge Jeff Kaplan (signed by HBS) Copies to counsel: 06.17.97 Page(s): 1 (wcc)
6/18/97	54	ORDER denying [43-1] motion to strike petitioner's ex parte sealed motions for investigative funds (signed by HES) Copies to counsel: 06.18.97 Page(s) 2 (wcc)
6/20/97	55	ORDER to show cause, set answer due for 9/15/97 for Director TDCJ (signed by JKaplan) Copies to counsel: CMRRR 6/20/97 Page(a) 1 (ldf) [Entry date 06/23/97]
7/8/97	56	CERTIFIED MAIL executed as to Director TDCJ 7/1/91 [55-3] order (1) (jas)
7/21/97	57	SEALED DOCUMENT placed in sealed area (jas)

DATE	NO.	PROCEEDINGS
7/28/97	58	ORDER that the Court's 6/16/97 memorandum Order is amended as follows: counsel shall submit vouchers once every two months, see order for specifics (signed by Magistrate Kaplan) Copies to counsel: 7/28/97 Page(s) 1 (jas)
8/12/97	59	Amended PETITION for writ of habeas corpus; Date Received; 6/12/97 (15+) (USC) (jas) [Entry date 08/13/97]
8/22/97	60	MOTION with memorandum in support by defendant Director TDCJ to substitute Erik Everett Cary for Laura Hayouth Popps (3) (jas)
8/22/97	61	MOTION with memorandum in support: by defendant Director TDCJ to extend time within which to file a responsive pleading (3) (jas)
8/22/97	62	ORDER granting (60-1) motion to substitute Erik Everett Cary for Laura Bayouth Popps (signed by Magistrate Kaplan) copies to counsel: 8/25/97 Page(s) 1 (jas) [Entry date 08/25/97]
8/22/97	63	ORDER granting [61-1] motion to extend time within which to file a responsive pleading reset answer due for 9/18/97 for Director TDCJ (signed by Magistrate Kaplan) Copies to counsel: 6/25/97 Page(s) 1 (jas) [Entry date 08/25/97]
9/2/97	64	SEALED DOCUMENT placed in sealed area (Jas)

DATE	NO.	PROCEEDINGS
9/19/97	65	ANSWER to Complaint by defendant Director TDCJ and Motion for Summary Judgment and Supporting Brief (15+) (jas)
9/19/97	65	MOTION with memorandum in support by defendant Director TDCJ for summary judgment (15+) (jas)
9/24/97	66	NOTICE of Re-Designation of Attorney-In-Charge by plaintiff Thomas Joe Miller-El (2) (Jas)
9/24/97	67	MOTION with memorandum in support by plaintiff Thomas Joe Miller-El for leave to file reply to respondent's answer and motion for sum jgm. on or before 11/7/97 (5) (jas)
9/25/97	68	ORDER granting [67-1] motion for leave to file reply to respondent's answer and motion for sum jgm. on or before 11/7/97 Response to motion reset to 11/7/97 for [65-1] motion for summary judgment (signed by Magistrate Kaplan) copies to counsel: 9/25/97 Page(s) 1 (Jas)
9/25/97	69	Minute order: Ex Parte Hearing re: Attorney fees Held before Magistrate Judge Jeff Kaplan, taken under advisement; supplemental materials due by end of the week Court Reporter: electronic (2) (jas) [Entry date 09/26/97]
10/17/97	70	SEALED DOCUMENT placed in sealed area (jas)
10/21/97	71	SEALED DOCUMENT placed in sealed area (Jas) [Entry date 10/22/97]

DATE	NO.	PROCEEDINGS
11/6/97	72	Unopposed MOTION by plaintiff Thomas Joe Miller-El to extend time/to reschedule due date for petitioner's reply to appellant's answer (3) (jas) [Entry date 11/07/97]
11/7/97	73	ORDER granting [72-1] motion to extend time/to reschedule due date for petitioner's reply to appellant's answer; the reply is now due on 11/10/97. (signed by Magistrate Kaplan) Copies to counsel: 11/10/97 Page(s) 1 (jas) [Entry date 11/10/97]
11/10/97	74	CROSS MOTION for summary judgment by plaintiff Thomas Joe Miller-El (3) (Jas) [Entry date 11/12/97]
11/10/97	75	Reply to respondent's answer and MEMORANDUM by plaintiff Thomas Joe Miller-El in support of [74-1] cross motion for summary judgment (15+) (USC) (jas) [Entry date 11/12/971
11/18/97	76	SEALED DOCUMENT placed in sealed area (Jas)
11/19/97	77	**UNFILED PER ORDER UNFILING PLEADING 12/5/97** NOTICE of intent to supplement the record and to file motions for discovery and an evidentiary hearing by plaintiff Thomas Joe Miller-El (15+) (jas) (Entry date 11/20/97] [Edit date 12/06/97]
11/24/97	78	SEALED DOCUMENT placed in Sealed area (Jas)

DATE	NO.	PROCEEDINGS
12/5/97	79	ORDER unfiling [77-1] notice by plaintiff Thomas Joe Miller—El due to the following deficiency: FRCP make no provision for the filing of such a notice. copies to counsel: 12/8/97 (signed by judge Jeff Kaplan Page (s) 2 (jas) [Entry date 12/08/97]
12/8/97	80	MOTION by plaintiff Thomas Joe Miller-El for discovery (17) (jas)
12/8191	81	MOTION by plaintiff Thomas Joe Miller-El in the alternative to petitioners cross-motion for sum jgm for an evidentiary Hearing (12) (jas)
12/8/97	82	Supplemental MEMORANDUM by plaintiff Thomas Joe Miller-El on Batson/Swain claim based on previously unavailable evidence (15+) (USC) (jas)
12/8/97	83	MOTION by plaintiff Thomas Joe Miller-El for leave to file supplemental briefing or in the alternative to amend (6) (jas) [Entry date 12/10/97]
4/24/98	84	SEALED DOCUMENT placed in sealed area (jas) [Entry date 04/27/98]
4/27/98	85	SEALED DOCUMENT placed in sealed area (jas) [Entry date 04/28/98]
6/16/98	86	SEALED DOCUMENT placed in sealed area (jas) [Entry date 06/17/98]
6/30/98	87	SEALED DOCUMENT placed in sealed area (lch) [Entry date 07/02/98]

DATE	NO.	PROCEEDINGS
3/3/99	88	MOTION by plaintiff Thomas Joe Miller-El for execution date (1) (Jas) [Entry date 03/08/99]
3/8/99	89	ORDER re: pla's mtn for execution date; petitioner shall file a response to this order by 3/19/99 and respondent shall file a response by 3/30/99 re: whether an execution date has been set and whether petitioner wants to dismiss his application for writ of habeas corpus or proceed with the case, See order for specifics (signed by Magistrate Kaplan) Copies to counsel: 3/8/99 Page(s) 2 (jas)
3/17/99	90	AFFIDAVIT by plaintiff Thomas Joe Miller-E1 Re: (89-1) order (1) (jas) [Entry date 03/18/99]
3/19/99	91	Memorandum to the Court/RESPONSE by plaintiff Thomas Joe Miller-El to [89-1] order (5) (jas) [Entry date 03/22/99]
3/30/99	92	RESPONSE by defendant Gary Johnson to [89-1] order (4) (jas) [Entry date 03/31/99]
3/31/99	93	ORDER petitioner has reaffirmed his desire to prosecute this death penalty habeas case . . the Court will disregard any statements to the contrary contained in petitioner's letter dated 2/27/99. (signed by Magistrate Kaplan) Copies to counsel: 3/31199 Page(s) 1 (jas)

DATE	NO.	PROCEEDINGS
7/28/99	94	ORDER . . .The parties are directed to answer these issues (specified in this order) in a written response; petitioner shall file him response to this order by 08/16/99: Respondent shall file his response by 08/31/99; Responses]ball not exceed 15 pages in length; No further pleadings will be allowed w/out leave of court (signed by Magistrate Judge K counsel: 07.28. 99 Page (s) 3 (lag)
8/16/99	95	Supplemental Court-Ordered Briefing/ RESPONSE by plaintiff Thomas Joe Miller-El to [94-1) order (17) (jas) [Entry date 08/17/99]
9/2/99	96	Supplemental Court-ordered Briefing on Procedural issues/RESPONSE by defendant Gary Johnson to [94-1] order (6) (jas) [Entry date 09/03/99]
12/3/99	97	SEALED DOCUMENT placed in sealed area (svc) [Entry date 12/06/99]
12/8/99	98	SEALED DOCUMENT placed in sealed area (amy)
12/10/99	99	SEALED EX PARTE DOCUMENT placed in sealed area (svc) [Entry date 12/13/99]
12/15/99	100	SEALED DOCUMENT placed in sealed area (svc) [Entry date 12/16/99]
12/15/99	101	SEALED DOCUMENT placed in sealed area (svc) [Entry date 12/16/99]

DATE	NO.	PROCEEDINGS
1/31/00	102	FINDINGS, CONCLUSIONS AND RECOMMENDATIONS Petitioner's application for Habeas Corpus should be denied Signed by Judge Kaplan, copies to cnsl: 1/31/00 Case no longer referred to Magistrate Judge Jeff Kaplan Objections to F and R due by 2/16/00 (15+) (nmc) [Edit date 02/10/00]
1/31/00	—	PRELIMINARY ASSIGNMENT TO Magistrate Judge Jeff Kaplan (nmc)
1/31/00	103	ORDER Instructions for service and notice of right to object (signed by Judge Kaplan) Copies to counsel: 1/31/00 Page(s) 2 (nmc)
2/7/00	104	CERTIFIED MAIL executed as to Gregory W Wiercioch 2/2/00 (102-1) findings & recommendations (nmc) [Entry date 02/08/00]
2/7/00	105	CERTIFIED MAIL executed as to James Marcus 2/2/00 [102-1] findings & recommendations (nmc) [Entry date 02/08/00]
2/7/00	106	CERTIFIED MAIL executed as to James Marcus 2/2/00 [102-1] findings & recommendations (nmc) [Entry date 02/08/00]
2/7/00	107	CERTIFIED MAIL executed 2/2/00 [102-1] findings & recommendations (nmc) [Entry date 02/08/00]
2/7/00	108	CERTIFIED MAIL executed as to Thomas Joe Miller-E1 2/3/00 [102-1) findings & recommendations (nmc) [Entry date 02/08/00]

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DATE	NO.	PROCEEDINGS
2/10/00	109	Unopposed MOTION by plaintiff Thomas Joe Miller-E1 to extend time to file objections to Magistrate Judge's findings and recommendations (3) (nmc)
2/10/00	110	ORDER granting [109-1] motion to extend time to file objections to Magistrate Judge's findings and recommendations Objections reset to 2/25/00 for [102-1] findings & recommendations (signed by Judge Sanders) Copies to counsel; 2,11,00 Page (s) 1 (mln) [Entry date 02/11/00]
2/25/00	111	MOTION by plaintiff Thomas Joe Miller-E1 for oral argument on petitioner's objections to the Magistrate judge's memorandum and recommendation (6) (nmc) [Entry date 02/28/001
2/25/00	112	OBJECTION by plaintiff Thomas Joe Miller-E1 to (102-11 findings & recommendations (15+) (nmc) [Entry date 02/28/00]
2/28/00	113	Corrected OBJECTION by plaintiff Thomas Joe Miller-E1 to [102-1] findings & recommendations (15+) (nmc) [Entry date 02/29/00]
3/7/00	114	ORDER The court will hear oral argument on Findings and Recommendation and petitioner's objections on 3/22/00 at 2:00 (signed by Judge Sanders) Copies to counsel: 3/8/00 Page (s) 1 (nmc) [Entry date 03/08/00]

DATE	NO.	PROCEEDINGS
3/15/00	115	Unopposed MOTION by defendant Gary Johnson to continue (3) (nmc) (Entry date 03/16/001
3/15/00	116	Letter from Ann Kraatz notifying that she is now that attorney for Johnson (nmc) (Entry date 03/17/001
3/17/00	117	ORDER granting [115-1] motion to con—tinue The oral argument is reset for 4/28/00 at 2:00 (signed by Judge Sanders) copies to counsel: 3/17/00 Page(s) I (nmc)
4/28/00	118	Minute order: Oral Argument re: Findings and Recommendation of US Magistrate Judge Kaplan Held before Senior Judge Barefoot Sanders Court Reporter: Janet Wright . . . Oral Argument concluded. Order to be forthcoming (1) (vdf) [Entry date 05/01/00]
5/8/00	119	POST ARGUMENT BRIEF by plaintiff Thomas Joe Miller-E1 (8) (vdf)
5/17/00	120	APPLICATION/MOTION by plaintiff Thomas Joe Miller-E1 for Andrew Hammel to appear pro hac vice (3) (vdf) [Entry date 05/18/00]
5/17100	120	ORDER granting [120-1] motion for Andrew Hammel to appear pro hac vice (signed by Judge Sanders) Copies to 05/16/00 Page(s) 3 (vdf) [Entry date 05/18/00]

DATE	NO.	PROCEEDINGS
6/5/00	121	MEMORANDUM OPINION AND ORDER . . . The Court Adopts the Magistrate Judge's Findings and Recom-mendations. Miller-El's petition for writ of habeas corpus is hereby DENIED. (See order for specifics) (signed by Judge Sanders) Copies to counsel: 06/05/00 Page(s) : 6 (vdf)
6/5/00	122	JUDGMENT against plaintiff Thomas Joe Miller-E1 . . . This Judgment is entered pursuant to the Court's Memorandum Opinion and Order dated 06/05/00. It is ordered that the Court that petitioner Thomas Joe Miller-El's Petition for Writ of Habeas Corpus be, and the same is hereby, DENIED and DISMISSED. (signed by Judge Sanders) Copies to counsel: 06/05/00 Page (s) : 1 (vdf)
6/5/00	—	Case closed (vdf)
6/19/00	123	MOTION by plaintiff Thomas Joe Miller-E1 to alter or amend judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure (12) (vdf)
6/21/00	124	ORDER denying (123-11 motion to alter or amend judgment pursuant to Rule 59(e) of the Federal Rules of civil Procedure (See order for specifies) (signed by Judge Sanders) Copies to counsel; 06/22/00 Page(s) 1 (vdf) [Entry date 06/22/00]
7/20/00	125	NOTICE 0f APPEAL by plaintiff Thomas Joe Miller-E1. re [124-1] order payment: No fee paid TO Mailed (3) cc:Judge (jmr)

DATE	NO.	PROCEEDINGS
7/20/00	—	Notice of appeal and certified copy of docket to USCA: [125-1] appeal (jmr)
7/27/00	—	USCA Case Number, 00-10784 Re: (125-1J appeal USCAS received ROA 7/24/00 (jmr)
8/2/00	126	MOTION by plaintiff Thomas Joe Miller-El for certificate of appealability (8) (nmc) [Entry date 08/03/00]
8/8/00	127	Transcript order form from Attorney for Plaintiff: Transcript requested [125-1] appeal 4/28/00 Oral Argument, Court Reporter is 7anet Wright (jmr)
8/14/00	128	FINDINGS, CONCLUSIONS AND RECOMMENDATIONS of Magistrate Judge Jeff Kaplan Re; (126—1) motion for certificate of appealability should be denied; IFP should be granted Motion no longer referred (2) cc;Judge (jmr)
8/14/00	128	ORDER ADOPTING [128-1] findings & recommendations (Signed by Judge Sanders) Copies to counsels 8/14/00 Page(s): 2 (jmr)
8/14/00	128	ORDER denying [126-1] motion for certificate of appealability is denied proceed in forma pauperis is granted (signed by Judge Sanders) Copies to counsel: 8/14/00 Page (s) 2 (jmr)
8/14/00	—	Deadline updated; appeal record due set for 8/28/00 for [125-1] appeal (jmr)

DATE	NO.	PROCEEDINGS
8/28/00	—	Transmitted record on appeal 12 vol, record, 1 Sealed vol. and 13 SCR folders to U.S. court of Appeals; [125-1] appeal (jmr) [Entry date 08/23/00] [Edit date 08/28/00]
10/11/00	129	TRANSCRIPT filed Appeal record due on 10/26/00 [125-1] appeal, for date of 4/28/00 Oral Argument (jmr)
10/31/00	—	Transmitted supplemental record of 4/28/00 transcript on appeal: [1251] appeal (jmr)
8/9/01	130	OPINION of USCA . . . COA is denied (certified copy) in accordance with USCA judgment re: [125-1] appeal (21) cc; Judge (jmr)
8/13/01	—	Record on appeal returned 12 vol. record, 1 transcript, 11 SCR folders and 2 sealed vols. from U.S. Court of Appeals: appeals (jmr)

US COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed 07/124/00]

00—10784

THOMAS JOE MILLER—EL,
Petitioner—Appellant,

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent—Appellee.

DOCKET ENTRIES

DATE	PROCEEDINGS
7/24/00	Death penalty case docketed, NOA filed by Appellant Thomas Joe Miller-E1 [00-10784] (mrw)
7/24/00	Criminal Justice Act 20 voucher issued to Andrew A Hammel for Appellant Thomas Joe Miller-E1 . (00-10784 (jar)
7/24/00	Criminal Justice Act 20 voucher issued to James William Marcus for Appellant Thomas Joe Miller-El . (00-10784) (jar)
8/4/00	Appearance form filed by An Kraatz for Appellee Gary L Johnson. X00—107841 (mrw)

DATE	PROCEEDINGS
8/7/00	Transcript order received from Appellant Thomas Joe Miller-E1 for Court Reporter Janet Wright. Date of Hearing: 4/28/00. [00—10784] Transcript order ddl satisfied. Ct. Reporter Acknowledgment due on 8/22/00 for Janet Wright (mrw)
8/10/00	Appearance form filed by James William Marcus for Appellant Thomas Joe Miller-El.[00-10784] (mxw)
8/17/00	District Court order-COA denied. Date Denied: 8/14/00 [00-10784] Awaiting DC Action ddl satisfied. (mrw)
8/24/00	Transcript order acknowledgment received from Court Reporter Janet Wright. Estimated pages: 35 Date Financial Arrangements Made: 8/4/00 [00-10784] Ct. Reporter Acknowledgement ddl satisfied. Transcript due on 9/5/00 for Janet Wright. Ct. Reporter Discount Date is 10/4/00 for Janet Wright. (mrw)
8/30/00	Record on appeal filed. Vol(s) of Pleadings; 13 Exhibits: +4 Boxes (Containing 11 folders of SCP) SEALED: 2 Envelopes. (1 contains volume #4) and (1 contains Exhibits) [00-10784] (Mrw)
10/18/00	Discount of 10 percent invoked for Court Reporter Janet Wright [00-10784] Transcript ddl updated to 11/6/00 for Janet Fright. Ct. Reporter Discount Date updated to 11/6/00 for Janet Wright. (mrw)
11/3/00	Supplemental record on appeal filed. Supplement #: 1 Vol (s) of Transcripts: 1 [00—10784] Transcript Deadline Satisfied. Court Reporter Discount Date Cancelled. (mrw)

DATE	PROCEEDINGS
11/6/00	BR-7 Letter issued to parties since COA denied in District Court. [00-10784] Motion for COA due on 12/18/00 for Thomas Joe Miller-E1. Brief in Support of COA due on 12/18/00 for Thomas Joe Miller-E1. (mrw)
11/7/00	Record on appeal released to attorney James William Marcus for Appellant Thomas Joe Miller-E1. Volumes: 12 (Vols 1-3 & 5-13, only) Supplemental Volumes: 1. [00-10784] (lxc)
12/1/00	Extension granted bar phone until: 1/17/01 to file Motion for COA & Brief in Support for Appellant Thomas Joe Miller-E1. [00-10784] (mrw)
12/4/00	Confirmation letter filed by Appellant Thomas Joe Miller-E1 confirming an extension of time to and including 1/17/01 for filing Motion for COA & Brief. [00-10784] Motion due dd,l updated to 1/17/01 for Thomas Joe Miller-El. Brief in Support ddl updated to 1/1?/01 for Thomas Joe Miller-E1. (mrw)
12/5/00	Attorney motion filed by James William Marcus far Appellant Thomas Joe Miller-E1 to substitute counsel Elizabeth Detweiler for Andrew Hammel (3073649-11 [00-10784] (mrw)
12/8/00	COURT order filed granting attorney motion to substitute counsel [3073649-1] (attorney Andrew A Iiammel for Thomas Joe Miller-El terminated) Atty added: Elizabeth Detweiler (HRD) Copies to all counsel. [00-10784] (mrw)
12/12/00	Criminal Justice Act 20 voucher issued to Elizabeth Detweiler for Appellant Thomas Joe Miller-El . [00-10784] (jar)

DATE	PROCEEDINGS
1/10/01	Motion filed by Appellant Thomas Joe Miller-E1 to file brief in support of COA in excess of the word count limitation but not to exceed 28,000 words. [3106144-1] [00-10784] (mrw)
1/18/01	COURT Order filed granting appellant's motion to file brief in support of COA in excess of the word count .imitation, but to to exceed 28,000 [3106144-1] (HRD) Copies to all counsel. [00-10784] (mrw)
1/22/01	Motion filed by Appellant Thomas Joe Miller-El for certificate of appealability [3114865-1] Motion due ddl satisfied. [00-10784] (mrw)
1/22/01	Brief filed in support of motion for Certificate of Appealability (Incorporated in motion) [3114865-1] by Appellant Thomas Joe Miller-El Brief in support ddl satisfied. [3114867-1] [00-10784] (mrw)
1/22/01	Record on appeal returned to 5CCA. Volumes: 1-3 & 5-13 supplemental Volumes: 1 [00-107841 (mrw)
2/12/01	Extension granted by phone until: 3/23/01 to file response to COA for Appellee Gary L Johnson. [00-10784) (mzw)
2/21/01	Confirmation letter filed by Appellee Gary L Johnson confirming an extension of time to and including 3/23/01 for filing Response to COD. [00-10764] (mrw)
3/23/01	Response/opposition filed by Appellee Gary L Johnson to motion for Certificate of Appealability [3114865-1] by Appellant Thomas Joe Miller-E1 Response/Opposition ddl satisfied. [3172759-1] [00-10784] (mrw)

DATE	PROCEEDINGS
4/2/01	Motion filed by Appellant Thomas Joe Miller-El [3181515-1] for leave to file reply to response/opposition [3172759-1] by Appellee Gary L Johnson [00-10784] (mrw)
4/5/01	COURT order filed granting appellant's motion for leave to file reply to respondent's response/opposition to COA by 4/13/01 [3181575—1] (HAD) Copies to all counsel. [00—10784] (mow)
4/13/01	Reply filed by Appellant Thomas Joe Miller-El to response/opposition [3172759-1), motion for Certificate of Appealability [3114865-1] [3195886-1] [00-10784] (mrw)
5/21/01	Criminal Justice Act 20 received from James William Marcus for Appellant Thomas Joe Miller-El, Appellant Thomas Joe Miller-El Timely: y/final payment request. [00-10784] (cgp)
5/21/01	Criminal Justice Act 20 received from Elizabeth Detweiler for Appellant Thomas Joe Killer-El Timely: y/interim request #1. [00-10784] (cgp)
8/7/01	Opinion order filed denying appellant's motion for Certificate of Appealability. (ISSUED AS AND FOR THE MANDATE) [3114865-1] Issd in T form? y Judge EHJ HRD RMP [00-10784] (jma)
8/7/01	Mandate issued, Approved BOC Issued (Y/N)?: n [00-10784] (Ima)
8/9/01	Record on appeal returned to 5CCA, Volumes: 13 supplemental Volumes: 1 Exhibits; 4 Boxes (Containing 11 folders SEALED: 2 Envelopes (volume #4) 6 (1 Containing Exhibits) [00-10784] Case Management ddl satisfied. (mrw)

DATE	PROCEEDINGS
8/9/01	Record on appeal returned to USDC. Volumes: 13 Supplemental Volumes: 1 Exhibits: 4 Boxes (containing 11 folders SEALED: 1 Env. [00-10784] (mrw)
8/21/01	Petition filed by Appellant Thomas Joe Miller-El for rehearing. # of copies filed: 4 sufficient [Y/N]: N need copy of court's opinion (3350091-11 Sufficient Rehearing due on 8/31/01 for Thomas Joe Miller-El . [00-10784] (mrw)
8/21/01	Petition filed by Appellant Thomas Joe Miller—El for rehearing en banc. # of copies filed: 20 Sufficient [YIN]: N copy of court's original opinion [3350358—1] [00—10794] (mrw)
8/23/01	Rehearing made sufficient by Appellant Thomas Joe Miller-El [00-10784] Sufficient Rehearing ddl satisfied. (mrw)
9/12/01	COURT Order filed denying petition for rehearing [3350091-1], denying petition for rehearing en banc [3350358-1] With poll (Y/N)?: N Copies to all counsel. [00-10184] .(mrw)
1/18/02	Supreme Court notice that petition for certiorari was filed on 12/11/01 by Appellant Thomas Joe Miller-El. Supct No.: 01-7662 [00-10784] (cav)
2/15/02	Supreme Court order received granting petition certiorari [3486654-1] by Appellant Thomas Joe Miller-El on 2/15/02. [00-10784] (Mrw)

JURY SELECTION IN A CRIMINAL CASE

It is often said that most cases are won or lost on Voir Dire—I agree. It is the first opportunity you have to impress the panel with your sincerity, integrity and ability. I believe in the importance of first impressions; if you can show—the panel that you wear the "white hat," and if you don't destroy that illusion during the trial, then the jury will *want* to convict. Who you select for the jury is, at best, a calculated risk. Instincts about veniremen may be developed by experience, but even the young prosecutor may improve the odds by the use of certain guidelines—if you know what to look for.

First and foremost, you are dealing with people, and there are no hard and fast rules governing who will be a good State's juror. Who you select, and what you qualify the panel on will depend on the type of crime, the age, color and sex of the Defendant, the rules of the Court, the personality of the defense attorney, and your own individual style and judgement.

The following outline contains very little substantive law because I presume that any prosecutor is as able to look it up as I. The outline does, however, contain one prosecutor's ideas on some things that need to panel , and some things to look for in a juror.

I. Purpose of Voir Dire.

A. Legal purpose.

1. To qualify jurors on law regarding case.

2. To become acquainted with veniremen so that you may use your strikes intelligently.

B. Tactical Purpose.

1. Allow the veniremen to be impressed with you and your cause.

2. Explain the law in the manner most beneficial to the State.

II. Preparation for Voir Dire. In many counties, the prosecutor selecting the jury will not present the evidence.

A. Look up and learn the law regarding the particular offense to be tried.

1. List and remember the elements of the offense.

2. Understand and remember any definitions of words of art applicable to the offense.

B. Be well acquainted with facts of your case.

1. Learn what general law—will be applicable to the facts.

2. Learn all weaknesses in the case in order to prepare the jury.

C. If you do not know the judge well, discuss Voir Dire with him in advance.

1. It will allow you to know where you stand on ques—
tionable issues so that you will not be embarrassed in front of the panel by an ruling.

2. If the judge usually conducts Voir Dire himself , he may allow the lawyers to do it if adverse asked—this is always preferable.

III. What to look for in a juror.

A. Attitudes.

1. You are looking for a strong, stable, individual who believes that Defendants are different from them in kind, rather than degree.

2. You are not looking for any member of a minority group which may subject him to oppression—they almost always empathize with the accused.

3. You are not looking for the free thinkers and flower children.

B. Observation is worthwhile.

1. Look at the panel out in the hall before they are seated. You can often spot the showoffs and the liberals by how and to whom they are talking.

2. Observe the veniremen as they walk into the courtroom.

a. You can tell almost as much about a man by how he walks, as how he talks.

b. Look for physical afflictions. These people usually sympathize with the accused.

3. Dress.

a. Conservatively, well dressed people are generally stable and good for the State.

b. In many counties, the jury summons states that the appropriate dress is coat and tie. One who does not wear a coat and tie is often a non—conformist and therefore a bad State's juror.

4. Women.

a. I don't like women jurors because I can't trust them.

b. They do, however, make the best jurors in cases involving crimes against children.

c. It is possible that their "women's intuition" can help you if you can't win your case with the facts.

d. Young women too often sympathize with the Defendant; old women wearing too much make—up are usually unstable , and therefore are bad State's jurors.

e. It is impossible to keep women off your jury, but try to keep the ratio at least seven to five in favor of men.

5. Weight. Extremely overweight people, especially women and young men, indicates a lack of self—discipline and often times in stability. I like the lean and hungry look.

6. Age. People over forty are more settled and more ready to believe that criminals should be punished.

7. Race. Minority races almost always empathize with the Defendant.

8. Demeanor.

a. Attentive, intelligent looking veniremen that you are able to communicate with on Voir Dire will generally be all right.

b. Always observe how the veniremen react when being questioned by the defense attorney, and compare it to the venireman's reaction to you.

IV. Your approach to the jury panel.

A. When the judge is talking to the panel.

1. Sit at the counsel table with your chair turned at an angle so that you can see the judge and the panel; ie, never turn your back to the panel.

2. Sit upright and have some eye contact with the panel.

B. When you are talking to the jury panel.

1. Stand upright and be as loose and at ease as possible.
2. Stand close to the panel. The further you are away, the more distant seems the communication.
3. Don't pace, but some movement may aid in keeping their attention.
4. Use your notes as little as possible.
5. Smile, be pleasant, but not too jovial; impress them with your earnestness.

V. Speaking to the entire panel.

A. Introductory. .

1. Introduce yourself, tell your position, who you work for and who you represent.
2. Introduce the Defendant and his attorney(s), asking if anyone knows them either personally or by reputation. Don't dignify the Defendant by calling him "Mister", or using his first name.
3. Orient the panel (if the judge does not) as to what Court they are in, the jurisdiction of the Court (as to felony vs. misdmeanor), explain the difference and explain that your purpose is to find twelve fair and impartial people to serve on this jury—people that can be just as fair to the State as you *know* they will be to the Defendant.

a. This approach makes it appear that the State is the underdog—most people will pull for the underdog.

b. Reasons for briefly orienting the panel.

(1) Most veniremen are ignorant of any spe—cifics regarding the Courts and the legal procedures.

(2) It gives the panel the feeling that you are trying to aid them.

4. Explain their duties as jurors.

a. They are not expected to know the law and, the judge will give them all the law of the case in the Court's charge.

b. The jury is to determine the f acts of the case, the credibility of the witnesses, and the weight to be given their testimony.

(1) The jury may believe all, any part of, or nothing that any witness says.

(2) They may look to the witness demeanor motive or bias, reasonableness of what is said—using their common sense to guide them.

c. If you know that the Defendant has more witnesses than you, explain that numbers are not decisive, and they may disbelieve one hundred witnesses in favor of the testimony of one.

B. Qualifying the panel on the general law. This is the law applicable to every criminal case.

1. Presumption of innocense.

Tell the jury

a. All Defendants in a criminal case, no matter what they are cha,ged with, are presumed to be innocent.

b. It is a legal presumption and just because they are presumed to be innocent does not mean that he (the Defendant) did not commit the crime.

c. This presumption lasts only until the State removes it by proving its case to their satisfaction beyond a reasonable doubt.

2. Burden of proof—beyond a reasonable doubt.

Explain that:

a. The State understands that burden and willingly accepts it, or else would not be here.

b. Though we accept our burden, we wish to be held to no higher burden, such as; beyond any doubt, or beyond a shadow of a doubt.

c. A mere discrepancy in evidence is not reasonable doubt.

d. The doubt must be reasonable, and it must be a reasonable doubt applicable to one of the elements of the offense that the law requires the State to prove to entitle it to a conviction.

3. Defendant's failure to testify.

Explain that:

a. The Defendant may call witnesses in his own behalf if he chooses, and may subpoena any witness that could help him.

b. The Defendant may testify in his own behalf if he chooses, but if he should decide not to testify, we who represent the people can not call him as a witness and they, the jury, could not consider his failure to testify as any evidence.

c. If he should so choose to testify, they must consider his credibility; looking to his demeanor, the reasonableness of his testimony, and his motives for lying—what he has to gain or lose.

d. Just because he is presumed to be innocent, does not mean that he is presumed to be a truth teller.

C. Qualifying the panel of the law of your case.

1. Carefully explain the elements of the offense as listed in the indictment and advise the panel that the State must prove these things, but none other.

2. Define any words of art that are necessary to your case and distinguish the legal meaning from the usual meaning, such as:

a. "Intoxication" is not necessarily drunk.

b. "Malice" is not premeditation.

c. "Possession" is not ownership.

d. "On or about" means accessable.

e. "Assault" does not require a touching.

f. "Carnal knowledge" requires only penetration.

3. Give examples when you explain the law. The examples should be of a crime less aggravated than the one you intend to prove, so when you pre—sent your facts the jury will think it is a highly aggravated crime.

4. Qualify the panel on defensive issues.

a. The defense attorney will do this anyway, so you tell them first and in the light most beneficial to the State.

b. Circumstantial evidence.

(1) Explain that it is a type of evidence , and is different only in kind to direct evidence. Tell them that fingerprints are circumstantial evidence.

(2) Give examples of circumstantial evidence.

5. Punishment.

a. This is the most important qualifying issue.

(1) In many cases the only issue is that of punishment. A case is never won unless a jury returns more time than you offer on a plea of guilty.

(2) A person weak on the maximum punishment will gene rally be weak on guilt.

b. Tell the jury that the State intends to ask the jury a sentence for "life" (or a substantial number of years, etc.) at the close of the testimony.

(1) This can backfire unless you have evaluated the case and know that you can ask "life" (etc.) without looking ridiculous.

(2) This is a good approach because it gives the jury time to get used to the idea of a high verdict.

(3) It allows you to argue on punishment that you have been fair with them (the jury) from the outset by telling them what you would be seeking.

c. Always stress the maximum in the range of punishment, but advise and qualify the panel on the minimum—otherwise, you may lose your aura of extreme fairness.

d. Probation.

(1) Ask the judge to require the application for probation to be filed before jury selection so you may qualify the jury.

(2) Explain the probation law to the panel, and that just because a person may be eligible for probation, does not mean that he is entitled to probation.

(3) On heavy cases such as murder, rape and robbery, etc:

(aa) Explain that every Defendant, no matter what he is charged with falls within the probation lair.

(bb) The minimum punishment, especially probation, is fertile ground for the defense disqualifying a juror for cause. Since you talk to the panel first, you can prevent the disqualification of a strong juror.

(11) Explain that they don't have to be able to *think* of a murder case where the Defendant may deserve probation, but if one *should* come along, and they thought it was the right thing to do, they could—vote it.

(22) Couch the question in terms of what a "fair" person would do (no one considers themselves unfair.)

(4) Always tell the jury that the State is opposed to probation in this case.

e. Tell the panel about a bifurcated trial and that on punishment they may consider all of the evidence introduced on the guilt or innocence phase of the trial, and also the reputation, character and prior criminal record, if any, evidence of which may be admitted on the punishment hearing.

(1) The above is a true statement of the law, and any judge should allow a prosecutor to so advise the jury.

(2) Stress the words, "and prior criminal record", because it will dispell the jury's beliefs that a Defendant's record will be admitted on the guilt or innocence hearing.

f. Talk in terms of a "sentence" of life, etc. stressing the word "sentence". This will convey to the panel the fact that he will be paroled early.

g. The State has no burden of proof on punishment as it does on guilt. We need not prove beyond a reasonable doubt that the Defendant deserves any Particular sentence—it is the jury's job to make the punishment fit the crime.

VI. Questioning the veniremen individually—this is done after addressing the panel as a whole.

A. Demeanor, preliminaries and helpful hints.

1. The questioning will progress much more smoothly if you can persuade the Court to seat the veniremen in the order that they are listed.

2. Be pleasant and respectful. Use "Yes, sir" or "Yes, Ma'am", and never talk down to a venireman.

3. Remember that the veniremen are probably self concious; the more at ease you are with them the more they will be at ease and honest xxxx you.

4. Never give any indication to the panel as to whom you will strike.

5. Look at the venireman's eyes and throat during your questioning (especially relating to punishment).

6. Rate your venireman from one to five in the order of his desirability.

a. This will allow you to concentrate on the individual and his answers rather than writing.

b. If you want a record of their answers, have someone else in Court take notes.

7. In striking your lists be careful; more than one prosecutor has left an undesirable venireman on the jury as a result of striking the wrong name.

B. Questioning the venireman individually.

1. Ask the length of residence in the county.

a. People that move around very much are often unstable.

b. If the venireman have not lived in the county long, ask where they were born and reared.

(1) People from small towns and rural areas generally make good State's jurors.

(2) People from the east or west coasts often make bad jurors.

2. Who their family consists of.

a. People with a family are generally more responsible and therefore better jurors.

b If the venireman has children, ask their ages if the case is one involving a crime against children, or the Defendant is young.

3. Occupation.
   a. Ask a man "what is your profession or occupation?". Ask a woman "Are you employed outside the home?"
   b. Working men.
      (1) If a man is unemployed it may indicate instability.
      (2) Men who are self—made successes, or work with their hands, or work in a managerial capacity are usually good.
      (3) Technical jobs (engineers, accountants and scientists). There are two theories:
         (a) They will pick your case apart, therefore, they are bad.
         (b) They are not inclined to "chase rabbits" thrown out by defense attorneys, there—fore they are good.
      (4) Intellectuals such as teachers, etc. generally are too liberal and contemplative to make good State's jurors.
   c. Working women.
      (1) These women are often preferable to other women because they have had a glimpse of the cruel, hard world.
      (2) Women working in retail sales often make good State's juror's.
   d. Spouse's occupation is a good question because all people to a varying extent, are reflections of their spouse.

4. Ask if the venireman has any hobbies or interests that occupy their spare time.
   a. Active outdoors type hobbies indicate the best State's jurors.
   b. Hunters always make good State's jurors.
5. Ask men if they have ever served in the military; if so, when, what branch of the service, their rank upon discharge and if they saw combat. Marines, master sargeants and those that have seen combat generally make good State's jurors.
6. Ask veniremen their religious preference.
   a. Jewish veniremen generally make poor State's jurors. Jews have a history of oppression and generally empathize with the accused.
   b. Lutherans and Church of Christ veniremen usually make good State's jurors.
   c. Those that indicate that they have no religious preference are often nonconformists and bad State's jurors.
7. Ask veniremen if they have ever had a direct interest in the outcome of a criminal case.
   a. This is an interest in the sense that they, or a member of their family, or close personal friend has been charged with a crime.
   b. If someone volunteers, take him before the bench to illict further questions, rather than embarrass the venireman in front of the entire panel.
   c. Obviously, you don't want anyone who had a close friend or relative that was prosecuted by the State.

8. Ask the veniremen if they have previously served on a criminal jury.

   a. Experienced jurors usually are better for the State than the inexperienced Jurors.

   b. You may ask the veniremen anything about the prior case other than the verdict.

JURY SELECTION IN A CRIMINAL CASE

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[6] jury panel shuffled?

MR. KINNE: No, Your Honor.

THE COURT: Does the defense wish a shuffle?

MR. CUNNINGHAM: Give us one minute, Judge.

MR. NELSON: We're going to change our election. We changed our decision.

THE COURT: I'm going to recess the jury panel to accomplish the shuffle for the State and let the lawyers attend to that.

MR. WEST: The State had already indicated they were not going to shuffle. I object.

THE COURT: I'll overrule. You still have your election. I'll overrule your objection and I'll recess the jury panel for you to accomplish the first shuffle and bring them back at 12:30. If the defense wants a shuffle, we'll do that and I'll go ahead with the [7] next shuffle.

(Whereupon, the following proceedings were held in the presence and hearing of the jury panel.)

THE COURT: Ladies and gentlemen of the jury panel, a procedural matter came up that I needed to attend to. Many of you must be wondering about lunch, if you're going to get to eat. I'm going to recess you—all until 12:45. That is only an hour and five minutes. It will be crowded downstairs and there will probably be a line.

Since I have not started any part of voir dire, let me give you these instructions: Since you have been called up as a prospective jury panel in the case entitled the State of Texas versus Thomas Joe Miller-El—he is—the man in the blue that looks like a leisure suit-you-all should not [8] and may not discuss his case or anything you might know or think you

may hear about it. There should not be any conversation about it. If someone talks about the case in your presence, anyone says anything in your presence about Thomas Joe Miller-El, tell them you're on a jury panel and the Judge has instructed you not to talk about it. I don't think anyone will, but if they do, let me know.

When you come back at 12:45, we may change the order that you're seated in, so stay out in the hall and we'll call you in. Thank you, folks.

(Whereupon, the jury panel and this cause were recessed for lunch, after which the following proceedings were held out of the presence and hearing of the jury panel.)

MR. WEST: Your Honor, we [9] will shuffle.

THE COURT: What I'm going to do is—this shuffle is granted—I'm going to go ahead and do general voir dire and ask the juro. to take the questionnaires and complete them so we can accomplish that much since this is the last shuffle that we'll have.

(Whereupon, the following' proceedings were held in the presence and hearing of the jury panel.)

THE COURT: Good afternoon, ladies and gentlemen. Welcome back. Let me start out with what I have to say by giving you some general information, I did not give you much information this morning before I recessed you because, at that time, I wasn't prepared to go forward with any more of this part of the voir dire.

* * * *

[15] been returned to us, we then—I will assign some sort of order or schedule of jurors that we'll talk to one by one. I hope to do at least one this afternoon. Probably the first juror over here will be number one. I don't know who will be number one at that time, but be that as it may, somebody will be the first juror to start out with. If we can keep a schedule,

and I think we can after the bumpiness of today, were going to talk to as many as six a day. As slow as that may sound, that is not slow. If we can do six a day, we will have accomplished a lot.

So very candidly, anyone who, when we start our selection process, is beyond the first two rows is probably not going to be reached at all to be talked to. We will talk to you one at a time. The purpose of that is very [16] simple. It allows the lawyers and the Court and you to have very important direct one-on-one contact which, in this kind of case, we find very vital and very necessary.

I know that many of you—all are wondering to yourself, well, they told me downstairs this morning that it would be one day or one jury. Well, let me tell you a little bit about our schedule. We hope—we being all the lawyers and I—that this jury selection process will be completed within a month. We expect it will take at least four weeks including this week. You will discharge the initial part of your jury duty by coming for your individual questions probably one day this week. If you're not reached this week on the list, then you're discharged from any further service in this case. We [17] will start out with a new panel next Monday to get fifty more people up here and start out with the same process. We'll do that every Monday until we select a jury.

If you're not on the jury and you're not reached at all or, if you are reached and you're on the jury or excused, then you're through, your service has been discharged. If you are selected as one of the jurors—and obviously this group would provide one of our early members or several early members, hopefully—then you would be sworn in and given a date which we expect to start the trial. You would be called back when all twelve jurors are selected and the alternates that we decide to select and the case will be started.

The case, the lawyers tell me, itself will probably take

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[658] third one depending on what the evidence shows. What Mr. Macaluso was asking and I think what Mr. Cunningham asked, the same question, if it was, if the evidence shows beyond a reasonable doubt that the answer to number one should be yes and number two should be yes, that you would have to answer yes., What you said is, you would not want to be put in that position by having taken the oath initially because you could not answer yes to those based on your understanding that would result in the Defendant being assessed by the Court, not by you but by the Court, the death penalty? That's sort of a convoluted question, but is that—

MR. NELSON: That is, in effect, what I said, yes, sir.

THE COURT: All right. Now, I think something else that you

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[773] The time that he committed the offense cannot be convicted of the offense of murder because e was insane. Do you agree with that, sir?

A. Did I understand you to say, if someone were proven insane at the time?

Q. Yes, sir. In other words, if the insanity defense is raised by the accused and that fact is established by a preponderance of thee evidence, then the law says that person is excused because of the fact that he was insane.

A Yes.

Q. Therefore, he's not quality of the intentional and knowing taking of another person's life because he did not have his mental capacity to do it. He didn't know what he was doing. Do you agree with that, sir?

A. Yes.

Q. Also, the law says, when you get involuntary manslaughter, a person is not quality of murder. So we are taking all these and leaving nothing but where a person

intentionally kills another person. He knows that he's killing him and there is no justifications, no excuse whatsoever. In that instance—

[774] Mr. MACALUSO: Excuse me, Your Honor, I don't mean to—pardon, me MR Cunningham. I believe the statement was made that there is no excuse whatsoever. No legal excuse I think would be the proper phrase. There may be all sorts of considerations or excuses, but no legal excuse.

THE COURT: Your point is made. Do you understand that, Mr. Wagoner, that the law does justify and excuse certain kinds of killings. Mr. Cunningham has mentioned several situations, if you're insane, self—defense, an accident. For example, even though the may have intentionally or knowingly caused the death of somebody, which would be murder ordinarily, if you did it while you were insane or self—defense, then the law justifies or excuses you in those situations. I think [775] that's what Mr. Cunningham is talking about. There my be a lot of other reasons, so there's a difference. Do you understand?

Mr. WAGONER: I understood that what the gentleman has just asked me, in my mind is it a legal reason, is it a law, that says that this—things that might be asked by a lawyer, if its' a law, is there a excuse written in the law that would protect—I use the word protect—the individual or be excusable for this individual for that particular thing. Did I answer to your question to your satisfaction?

Q. Yes, sir. You've indicated that you served on a kidnapping case. Did the jury reach a verdict in that kidnapping case?

A. Yes, we did.

Q. In the robbery case, did the jury reach a verdict?

A. They were connected together.

Q. In other words, you heard evidence [776] on the kidnapping one day and then evidence on the robbery case the next day?

A. It was three days of four altogether and they were combined.

Q. You went out and decided whether or not he was quality of kidnapping and after resolving that issue, you went out and decided whether or not he committed the robbery?

A. Yes.

Q. And you—all were able to reach a verdict?

A. We did.

Q. Did any of the district attorneys talk with you after the case was over with?

A. No. I say no. I asked one of them a question on my own after it was all completely over with.

Q. Was that about what sentence he would receive?

A. No.

Q. About something that happened during the trial?

A. No. I just wondered who paid both lawyers. I asked him that question. I don't know why I did, but I did ask the question. It

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[842] on our list. That last juror then would be Ms. Hernandez.

Now, let me give two sets of instructions, ladies and gentlemen. First of all, a good or bad news, I'm not sure how it's going to be taken. From Ms. Freeman on to the end of that row, which would be Ms. Freeman, Ms. Bradford, Mr. Gossett, Mr. Smith and Mr. Melton, and all of the back row will be excused from jury service in this courtroom at this time and the central jury room asked me to return you to them so they could see if they're going to need you for something else. I don't know whether they do or not, but you—all will not be voir dired in this case. There's no sense in tying your

time up at this time with what's I'm getting ready to finish with the panel I'm retaining

I appreciate your patience

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[1529] A. Yes.

Q. All right. You can't receive the death penalty for that type of a murder. On the other hand, if you commit murder, knowingly or intentionally casuing the death of somebody, and you murder somebody who is a policeman or a fireman or a jail guard, and those people are acting in the lawful discharge of their duties—their on the job, in other words—and they're killed, then murder is elevated, raised up to the level of capital murder and you can receive potentially the death penalty for that. Do you see what I'm getting at?

A. Yes.

Q. Some other types of capital murder would be murder of a bunch of people, mass murders. That's new under the law. Do you remember when the were six or seven people killed in a bar about two years ago?

A. Yes.

Q. That could be a capital murder under the law. Or if you kill somebody for hire, if I hired Mr. Nelson to kill Mr. Cunningham, I could be tired for capital murder for hiring him and be tried for doing [1530] the actual killing. Both of us could get the death penalty for hiring yourself out as a killer. Or, as we've alleged here in this indictment, if you commit murder while you're either attempting to commit or area actually committing another felony offense. If you murder someone while you're robbing them, if you murder somebody while you're burglarizing somebody's home, if your murder somebody by arson or you kidnap somebody that you murder. Do you see what I'm getting at?

A. Yes, sir.

Q. We call that murder plus. Right off it's a murder plus another very serious felony offense. How do you feel about

this? Do you feel those are the types of cases, generally speaking, where you feel the death genalty would be appropriate, depending on the facts and circumstances?

A. Well, there again, I would say it depends on the case and the circumstances involved at the time.

Q. Okay. But depending upon those things that you mentioned earlier, do you feel, things that you mentioned earlier, do you feel, for example, a murder during a robbery where a person had a choice to kill or not to kill? Do you see? Do you feel that would be the type of case that you feel the death penalty would be warranted in?

A. I think if you had a choice, you know.

Q. Now, let me ask you: Have you ever felt differently about the death penalty at all? Have you ever felt it wasn't the thing the to do or it wasn't—we didn't need it or we shouldn't have it?

A. Well, there again, it goes back to the situation, you know, sometimes.

Q. You know, some people have just a general disapproval of the death penalty. I know some people go down to Austin to lobby against it and have it repealed. You never were like that, I guess?

A. No, I've never—you know just as far as generally speaking, I've never.

Q. You feel it's proper on a case-by-case basis; is that right?

A. That's the way I look at it, depending on the individual case.

Q. Let me ask you: Do you see it [1532] serving a particular purpose in our society? Do you think it accomplishes anything in particular?

A. Yes and no. Sometimes I think it does and sometimes I think it don't. Sometimes you have mixed feelings about things like that.

Q. What do you think it accomplishes when you feel it does?

A. I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment.

Q. In other words, you feel under certain circumstances the death penalty would be bad, but being locked up in a cage would be a whole lot worse and be more punishment; is that what you're saying?

A Yes. In some case you feel like maybe if the person were to suffer in some other way maybe. Maybe I'm not being specific, [1533] but sometimes, you know, you feel maybe this is not really punishing the person to give him the death penalty.

Q. It's over?

A. Yes, it's over and you know, they're not really suffering from it.

Q. Let me ask you this: You're a marred man, aren't you?

A. Yes sir.

Q. Do you know or would you hazarded a guess how your wife feels about the death penalty?

A. No, I don't because we've never really discussed it.

Q It's not something that everyone sits down and hashes out, but sometimes people know or have a feeling. If you had to hazard a guess, if you guessed, what do you think her feelings would be?

A Well, if I had to guess, I would say probably it would depend on the situation.

Q You've got three children, is that right, sir?

A Yes, I have.

Q On of them is grown, though. [1534] Almost all of them are grown, aren't they?

A I have one still in high school.

Q Let's talk a little bit about the procedure in a capital murder case. You understand that under the old laws when a capital murder case was tried, the jury decided in the first part, of course, as they do today, whether the person is guilty or not guilty based on the evidence. If the State proves the indictment to the jury and the jurors has taken an oath to a true verdict render according to the law and according to the evidence, it would mean simply this: If they proved the case to you that the man is guilty, you find him guilty. Can you do that?

A Yes.

Q And if we didn't prove it to you, obviously, if you had a reasonable doubt about one of the accusations, you would find him not guilty. Could you do that ass well?

A. Yes.

Q Just call it the way you see it. That's all that would be expected. How, in the second part of the trial under the old law, the jury might hear more evidence and they might [1535] not. They might just learn about what happened in the offense itself. Under the old law, after you heard all of the evidence, the jurors would decide directly whether a person should receive the death penalty or a life sentence or some number of years. If you someone ought to die for what you heard and the others agreed to its, that's what he got, or life or whatever it was, if the jury unanimously agreed. Could you do that, if you were called upon to do that? Could you make that decision?

A I think I could.

Q Okay. No, that's kind of a trick question because the law doesn't allow you to do that any longer, directly. You don't decide directly whether someone should die or get a life sentence or a number of years. In fact, you can't even consider a number of years. Instead, they give you at the end of the trail—after you've heard all of the evidence, the Judge will give you two or three question to answer based on the evidence and the State has the burden of proof that the questions should be answered yes. If they prove they should

be answered yes, you answer [1536] them yes. Just like you would have to find the man guilty in the first part, you answer the questions yes if we prove that hey should be answered to you in the second part. Any problem with that at all?

A. No.

Q If we don't then you, as a juror, are required to answer the question no. could you do that, as well?

A Yes.

Q Do you understand the effect? All yes answers, that's the same as if you had written in death because the Judge—if you write yes, yes, yes, the Judge will automatically, under the law, assess a sentence of death to the Defendant. He can't say, "No, I don't agree with that. I'll give him a life sentence." You see, it's automatic. You're not writing death, but three yes answers equal death. Make no mistake about it could you do that?

A Yes, I could.

Q All right. The same thing, on of more no answers equals a life sentence. Whether the Judge agrees with you or disagrees [1537] with you, you'll never know anyway because he's not going to say that, what his feelings are. With all due respect t the Court, he's not in a position to tell you whether he agrees or disagrees. Now, you said you could that, as well?

A Yes.

Q All right. Let's look at the three questions. Take whatever time you need to read those, Mr. Warren, and we'll talk to you about them in a little bit more detail.

A (Juror complies.)

Q Any questions about those at all

A No.

Q The first one, I think, is pretty much self—explanatory. It asks you whether the Defendant acted deliberately with the Defendant acted deliberately with the reasonable expectation that the victim would die. You say

you could answer that question yes or no once you hear the facts of the case?

A Yes.

Q If you hear facts that convince you be acted deliberately, if you can hear facts that convince you that be acted with the reasonable expectation that someone would die, [1538] you answer the question yes. If you don't you answer the question no. Any problem with that?

A No.

Q How about number two? What do you think being asked there, Mr. Warren?

A In my opinion, I'm being asked would this person be a threat to society later.

Q The key word there is probability. What do you think that words means to you in that context?

A Maybe a chance or something like this.

Q Is there a chance that the Defendant would commit—it doesn't say a particular offence, does it?

A No.

Q It doesn't say another murder, another capital murder, rape robbery, burglary or an assault. It says criminal acts of violence. That may be self—defining. It may mean what it says it means, an act of violence. Is there a chance he will commit an act of violence, a crime, in the future? Do up necessarily agree with that?

A I suppose there's always that

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[1777] back this afternoon. Folk, thank you again for your patience. See you this week.

(Whereupon, the jury panel and this cause were recessed for lunch, after which the following proceedings were held.)

THE COURT: Well, on the record now that everybody is back including the Defendant, of course. Mr. Nelson, does the State have a question?

MR NELSON: Judge, out position is basically this: at the time of the second shuffle this morning when Mr. West and I went to the central jury room and shuffled, Mr. West had put the cards in the basket and started to pick them out and I said at that point, "Why don't you shuffle them a little bit more. I think we need to shuffle a little bit more." Or something like that. My [1778] recall is that Mr. West's comment at that time was, "Well, just take it up with the Court." That's what I'm attempting to do at this time.

My understanding that a reason for the shuffle is to completely rearrange or randomly select again the array in the seating of the jury. We have—I don't know the exact figures. Some people checked on it before me, but we have a large number of persons who didn't change position at all from the second list to the third list. We have sixteen in a row at one point and at another point ten in a row with only one person in between those groups.

Basically what we're saying is, Judge, that we have sixteen in a row and ten in a row with one in between and then six in a row. Although those things can happen, the State's position is, under the [1779] Latham case, shuffles are to be done in the courtroom unless it is otherwise agreed by the parties. We had that agreement up to the point where I objected to Mr. West's procedure down in central jury room and therefore, we would ask the court to hold that this shuffle was not correctly done and to either reshuffle the panel, the Court itself, or the clerk as directed by the case law and statute in this case or to quash this panel and we will begin with a new panel at the earliest possible time.

MR. CUNNINGHAM: Jim, could I ask you just one question?

MR. NELSON: Sure.

MR CUNNINGHAM: That was a first shuffle; is that correct?

MR. NELSON: That's correct.

MR. CUNNINGHAM: And you went down and shuffled on behalf of the State?

[1780] MR. NELSON: With Mr. West there.

MR. CUNNINGHAM: With Royce standing there?

MR NELSON: Right.

MR. CUNNINGHAM: And he didn't say anything about the way you did whatever you did?

MR. NELSON: No he did not.

MR. CUNNINGHAM: And then you cam back up here. The Jury panel was seated?

MR NELSON: No. The second time they were not seated.

MR. CUNNINGHAM: I'm talking about the first time, We came back up and we looked at the list and then we said we wanted to a shuffle right?

MR. NELSON: Before they were seated again.

MR. CUNNINGHAM: Then you went back down and there was a second shuffle?

MR. NELSON: That's when the [1781] events took place.

MR. CUNNINGHAM: Okay. But the State had received its shuffle?

MR. NELSON: Correct.

MR CUNNINGHAM: Okay. You then had some conversation with Royce and said you were going to take it up with the Court?

MR. NELSON: Well, I suggested that they may need to be shuffled some more and Mr. West say to take it up with the Court.

MR. CUNNINGHAM: Then we came up and went into the Judge's chambers, all four of us were in the Judge's chambers—

MR. WEST: We will waive the oath.

MR. CUNNINGHAM: We will waive it, but everything you said, you're saying as an officer of the court?

[1782] MR. NELSON: Yes, that's correct. If Mr. West disagrees with anything I've said as far as the conversation or anything, then—

MR. CUNNINGHAM: Then all four lawyers, with the Judge, went back into his chambers and you—all were talking about this matter?

MR. NELSON: Correct.

MR. CUNNINGHAM: At that time you did not say, "Judge we object to the manner in which Mr. Royce West shuffled the jury"?

MR. NELSON: That's correct. What was said at that time was, I had some people checking on some things and I wasn't finished checking.

MR. CUNNINGHAM: You did not tell the Judge, "We object and we don't want to go g any further right now"; is that true?

MR. NELSON: No, I didn't use those exact words.

[1783] MR. CUNNINGHAM: Then we came back out and the panel was seated again. The questionnaires were taken up and then the Judge started giving his instructions?

MR. NELSON: Correct.

MR. CUNNINGHAM: He excused sixteen jurors and you did not object to his excusing sixteen, is that correct?

MR. NELSON: The sixteen were excused.

MR. CUNNINGHAM: From the back row only?

MR. NELSON: Yes.

MR. CUNNINGHAM: Then after the Judge's instructions, he told everybody what time he wanted them back all of that and up to the point, you had not told the judge, " we object to this panel and we either want it reshuffled or we want the panel quashed"?

MR. NELSON: No, I had not said those words, but I had told [1784] the Judge that we had—that it might be a problem and that I was investigating it further. I believe the Court will recall that I informed the Court of that before the Court did his general voir dire.

MR. CUNNINGHAM: The week of February 3, the jury panel was seated. The State requested a shuffle. You and Mr. West went downstairs. You shuffled; is that correct?

MR. NELSON: This procedure has been followed.

MR. CUNNINGHAM: The weeks of February 3 and the week of February 11th, the same procedure that we did today?

MR. NELSON: Yes; but without objection from either side.

MR. CUNNINGHAM: In other words, you were familiar with thirty—five, forty, eleven; that [1785] they were supposed to be shuffled down and you did not object the week of February 3 or the week of February 10th and today until after you had gotten your shuffle and Mr. West had gone down and shuffled and then you objected or you said you wre going to take it up with the judge; is that correct?

MR NELSON: I made the comment to Mr. West while the second shuffle was going on. I don't know what words I used, but I indicated a disagreement and Mr. West's comment was

to take it up with the Court and I think that's probably all that was said on that subject.

MR. CUNNINGHAM: An this was supposed to have been the defense's shuffle?

MR. NELSON: It was one done at the defense's request, yes.

MR. CUNNINGHAM: That's all, [1786] Your Honor.

MR. WEST: Your Honor, my recollection of the incident was basically somewhat as Mr. Nelson has represented to the Court. No, I didn't say anything concerning the procedure that was used by Mr. Nelson. I haven't said anything for the past three weeks. I've used basically the same procedure. Now, the State is saying gat this point in time that, from some reason, the defense has done something with the panel in reference to placing them in some particular order.

MR. NELSON: Judge, I never said that. What I'm saying is, we feel that they should have been shuffled more thoroughly than they were.

MR. WEST: Judge, the fact of the matter is, it was the defense's shuffle at that point in time. MR. NELSON could have done [1787] what he wanted to do at the time that he had the right to shuffle and he did that. Then I turned around and did it according to how the defense wanted it done. Now, Mr. Nelson and I talked about it and he had made some mention down in the jury room that I was intentionally doing something and then he backed up off of that. Now, he is bringing it in under the guise as though just because sixteen jurors and one position on the first shuffle are in the same position on the third shuffle that it wasn't done randomly or the shuffle wasn't done correctly.

MR CUNNINGHAM: Your Honor, the point is, what this is really all about is that jurors number one, two, three, four and eight and fifteen on the first list were all black, that when

they went down and shuffled the first time, the black jurors were number [1788] nineteen, twenty-six, thirty-six, thirty-seven, thirty-eight and thirty-nine, that after the second shuffle those some six black are now one, two, three, four, seven and fourteen. That's what this is all about.

MR. NELSON: Judge, I'm going to object to Mr. Cunningham telling the Court what this is about. I voice the State's objections—the Court can tell from the procedure, and I would like the record to reflect, that I voiced my objection to this last array before I knew what it was. I voiced my objection to the shuffling down in the central jury room while it was going on and before I knew what order the jurors would come up here in.

MR WEST: Judge, Mr. Nelson was standing right by me when I shuffled. Now, he cannot dictate the number of times that the [1789] defense puts cards in or takes them out. I didn't try to dictate it at the time that he did it and he can't do it when I don it. Now, the facet of the matter is—and I'm putting it on the record—that for the last three weeks—specifically the week of the 10th we had black jurors on the front that the State immediately did a shuffle. They have a right to do that. The law provides for that. Both sides can shuffle.

Four jurors come up here the week of the 17th and they're black. They shuffle them with the jurors in the same order after his shuffle and they end up on the back row the same order. Now, he's crying about the jurors after the defense does their shuffle that they're back on the first row. They can sit as jurors. If they're qualified as jurors to sit in this particular case, then they [1790] should be able to do it without regards to race.

MR NELSON: Judge, at this point, if the defense wants to have it marked, they can have it marked, but Mr. Shipman prepared a chart of the differences between the second list

and the third list which indicates the very minimal amount of shuffling that resulted this time and that's what I'm saying is, they were not shuffled as thoroughly as they should have been. If the Court would like Mr. Shipman to explain the chart or go over the chart with the Court, he can. I think it will make our position fairly clear.

THE COURT: Well, you—all can put anything that you want to into the record, Mr. Nelson, but I don't believe the Court had any authority at this time to order a reshuffling of the quash this panel based on what I've heard, so I'm [1791] going to go with—

MR. NELSON: But under the Latham case, Judge, the only way the shuffle can be done that way it's been done the last two weeks and today is with the agreement of both parties.

THE COURT: I agree. That's the law.

MR. NELSON: The State has submitted that at the time I objected to Mr. West's procedure that terminated the agreement of both parties. Therefore, that shuffle is void and should be reconducted.

MR. CUNINGHAM: That might be all right except—

MR. WEST: He just said, "Don't you think you should shuffle them some more?

MR. CUNNINGHAM: Secondly, he's already gotten his shuffle. That's basically unfair

MR. MACALUSO: Well, Judge, [1792] if I understood Mr. West; is he saying at the time a particular side requests a shuffle, that side has complete control over the procedure of the shuffle? I need to be corrected on that, so there's no confusion in the future.

THE COURT: There won't be any confusion in the future. Next week; if we have any problems, I'm going to require that it be going to require that it be brought up here to the

Court and the shuffle or whatever it may be be conducted in the presence of the Court, so if either side has an objection at that moment in time, it can voice it to the Court on the record and I can decide whether the shuffle was properly done or not. It won't happen again, I've sat and practiced law in Dallas County for twenty-five years or longer and we've always gone to the central jury room to [1793] do it in the manner in which it was done in this case, so this is not something that has happened every time we have a jury shuffle. I'm sorry it didn't work out in this case.

MR. NELSON: I think my problem is, maybe you objected; but you didn't object promptly enough to cause me to stop the procedure when I could have stopped it and now I do not believe I can order a reshuffle,

MR. NELSON: I thought that I told the Court that we had a problem and there was some question about it and the Court indicated at that point that you anted to go ahead and do the general voir dire anyway for time purposes by other persons checking on the situation. I thought we agreed with that understanding and that's s why we did the general voir dire .

[1794] MR. WEST: Judge when did Mr. Nelson bring this to the Court's attention?

MR. NELSON: When all of us were back there before the general voir dire.

MR. WEST: Well; Judge; it was my understanding that the Court called all the attorneys into the clerk's office and asked if there was some sort of problem and Mr. Nelson said at that point in time, "I shuffled." and turned around and said that I had shuffled, There was no indication that there was a problem at that time.

THE COURT: The problem, Mr. Nelson; is, you didn't—you. Said, as I recall, that you weren't satisfied with the way the shuffle had been conducted or something like, but you

didn't object to the location. That's what you're objecting to [1795] now. I'm going to have to overrule the State's objection on this. Next week it will not be done this way. We'll go with the list that you've got for better or for worse.

Let's bring Mr. Rand in. Mr. Rand, how are you doing?

MR. RAND: Fine; sir.

THE COURT: Mr. Rand: I'll ask you, as much as possible to make yourself comfortable it may not be possible under the circumstances, but if you can lust do that, we would appreciate it, and answer the questions as I know you will, Mr. Macaluso, go ahead.

MR. MACALUSO: Mr. Nelson is going to talk Mr. Rand Judge.

* * * *

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RODERICK R. BOZEMAN,

[273] called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Mr. Bozeman. Mr. Bozeman, let me begin by reintroducing everyone here at the counsel table. My name is Paul Macaluso and to my immediate left is Jim Nelson.

MR. NELSON: Good morning.

THE WITNESS: Good morning.

Q You may recall being introduced the other day to Norman Rinne. He was seated over here to—it would have been your far right at the time. The three of us are assistant criminal district attorneys here in Dallas and we work for Henry Wade who, I'm sure you know, is the district attorney. We've been designated as the lawyers who will represent the State of Texas in this particular case.

Now, to Jim's immediate left is Mr. E. Brice Cunningham—

MR. CUNNINGHAM: How are you?

THE WITNESS: Good morning, sir.

Q —and to Mr. Cunningham's immediate left is Mr. Royce West.

MR. WEST: Good morning, sir.

Q You may also recall being introduced to them. They are the defense attorneys who have been appointed by His Honor Judge McDowell to represent the accused Defendant in this case. His name is Thomas Joe Miller-El. He is at your very far right in the powder blue suit.

The reason why I've taken the time to reintroduce you to everyone here is to let you hear our names again. I want to ask you if you recognize any one of us or have heard of any one of us other than common introductions?

A No.

Q Okay. Of course, I also did that to reacquaint you with the roles that we are playing in this particular case.

Now, as you know, at this [275] particular point, Mr. Bozeman, you are a prospective juror in this capital murder case. Mr. Miller-E1 is charged by indictment with the offense of capital murder, the most serious level of offense under the laws of this state. That is, it's serious because of the nature of the offense, of course, capital murder, and it's serious because of the two possible penalties a person can receive if he or she is convicted of this offense.. okay?

As you well know, if a person is .convicted of capital murder, they can receive either only a sentence of death or a sentence of life. Because of that, the law basically allows us to talk to you individually such as we're doing now.

Have you been down here on jury duty before?

A No, I haven't.

Q If you had, and you had been called on in any other case other than a capital murder case, the lawyers would have an opportunity to talk with you and ask you certain questions, but the conversation that you would have with the lawyers would have been [276] conducted while you would be sitting out there in the gallery much as these people are and as much as you were on Monday. The answers you give would be the answers you would give in the presence of forty or fifty virtual strangers. All right?

A Yes.

Q You can see how it might kind of make you a little bit nervous or inhibit you or not relax you as much as we want you to be, so they let us talk to you individually because it's a

little bit more quiet. I imagine, after a period of time, some of these people will—won't be out there and we will be a little more relaxed. Let me invite you to do that, relax as much as you can, and take a deep breath if you're a little bit nervous.

Let me remind you of something that the Judge said earlier. There are no right or wrong answers to any of the things we're going to be talking about. You're not here to please anybody and no one is going to argue with you or quarrel with you about anything or talk you into anything or out of anything. Your feelings, your impressions, and [277] your position, basically, are the things we're going to talk about and are the most important right now. We want to know how Mr. Bozeman thinks. It doesn't matter what we think. We want to know how you think, okay?

A Yes.

Q If you have a question about anything, Mr. Bozeman, by all means ask it because this is the time that you get to do that, all right? If there's a statement you would like to make or something you feel that you need to tell us in fairness to both parties here, then by all means do that, too. will you do that?

A All right.

Q Okay. Let me tell you what our position is right from the outset here. Sir, we are actively seeking the death penalty in this case for Thomas Joe Miller-E1. I want to let you know that from the very outset so you know exactly where we stand and what our position is going to be with regard to the evidence that is presented. We are actively seeking the death penalty in this case and that means that we intend to provide a jury, once [278] it's selected, with both the type and the quality of evidence that will convince them beyond a reasonable doubt that the Defendant is guilty just exactly as he's charged.

Then in the second part of the trial where the punishment is determined, either death or life, we once again intend to be

able to provide this jury with the type and the qualify of evidence that would convince them beyond any reasonable doubt that these questions that make that determination should be answered yes.

You know that three yes answers or all yes answers, that equals an automatic and mandatory sentence of death. Now, that's why I'm just telling you from the very outset, as we're going to tell all the prospective jurors, what our position is so it wouldn't come to you as any surprise if you're actually on the jury.

You understand that, ultimately, it's the jury's decision, not our position or their position, that really counts. Okay?

A Yes.

Q Now, Mr. Bozeman, I know you've been asked this question here on the [279] questionnaire and, as the Judge said, this saves us a great deal of time because otherwise, we would probably have to ask you all these questions and tie you up for much longer than you would want to be tied up. Let me ask you at this point if you would share with us, sir, in your own words, your feelings generally about the death penalty and capital punishment and how you personally feel about it and then, secondly, if you would share with us your feelings about whether you could actually serve on this type of a jury?

A Well, as far as the death penalty is concerned, I think it would, you know, depend on the circumstances involved in what happened, you know, whether I could say I would actually vote for that or not. Yes, I think I could, but, you know, I don't really know at this point. I'm sure I could, but as far .as the death penalty is concerned, I would have to know, you know, the circumstances surrounding it.

Q Let me just ask you, as a general proposition, how do you feel about the death penalty? I understand what you're saying, it would depend on the facts and circumstances, but as a general proposition, how do you view the death penalty,

how do you feel about it? I mean, do you think it serves a purpose in our society? Do you think we ought to have it?

A Yes, it does.

Q What sort of purpose do you feel it serves?

A Well, I think if there's no possible way to rehabilitate a person and he is harmful to society, you know, the State has that right, I feel.

Q You said, if there was no possible way to rehabilitate somebody. Let me ask you: What would be some indication to you, Mr. Bozeman, that someone was beyond rehabilitation?

A Oh, I would say somebody mentally disturbed or something like that or say a Manson type or something like that.

Q Would, for example, repeated criminal violent conduct be some indication to you, sir, that the person was beyond rehabilitation?

A No, not really. It would, I [281] guess, depend on the extent of the crimes that he has committed and if they were, you know, violent crimes over a period of time, different—yes, I believe that it would.

Q In other words, if you see a pattern developing, let's say, in a person's life where he tends to commit violent offenses when released into society, do you feel that is the type of person that you would be able to decide is perhaps not even worthy of or capable of being rehabilitated?

A Yes.

Q Now, let me set out a proposition here. I hesitate to do this because I don't like to pidgeonhole you, but sometimes it serves a purpose. With regard to the death penalty, we've found basically that we could probably categorize people generally speaking in three categories, and in no particular order. Let's say a type of individual who believes in the death penalty and also believes—knows himself well enough to know that they could actually serve on a jury and, if the

situation called for it, could actually make a decision that would result in someone actually receiving the death penalty. They believe in it and they could actually implement it, in other words, on a jury.

Let's say another class of individual, again in no particular order, believes in the death penalty as a proposition, but let's say when it comes to them actually serving on a jury, because of their personality or their temperament or whatever it may be, whatever the fact is, they just don't feel they could actually be the one to do it, could actually make the decision. They agree with it when they read about it in the paper and they agree with the philosophy, let's say, but they couldn't actually serve on the jury.

Let's say there's another class that doesn't believe in the death penalty and could never serve. I gather you' re not in the third category, but do you see yourself in either one of the first two?

A Oh, probably more the second group, I guess.

Q All right. We need to talk about that just a little bit. Mr. Bozeman, let me explain something here so it doesn't sound like [283] I'm rattling on endlessly and covering the same thing repetitiously. When we talk, no matter what we're talking about, and I'm asking you questions and you're answering, you're really talking to everyone here. You're certainly talking to the other lawyers and you're certainly talking to the Judge and, of course, to the court reporter who is taking down everything in this case for appeal purposes, okay, so it's necessary, legalistically speaking, that I ask some things and you'll say, "Why does he keep asking that?" or "Why does he keep going over that? He's repeating himself." or "Haven't I made it clear?" You may well have, but the law simple requires that we go into very tedious and minute detail on some of these things. The lawyers are already tired of hearing me talk and I know the Judge is, but it's really more important that you talk. When I ask you

questions, it's very important that you—I don't know how to put this delicately—not equivocate in your answers. If you can answer something yes or no, that's certainly the best way. Okay? I'm not trying to force you to answer, but do you [284] understand that it is very difficult for the Judge to make certain decisions in regards to a juror's service if someone says, "Well, maybe I could." or "I probably could." or "I possibly could." Do you see what I'm getting at?

A Yes.

Q Now, I'll give you all the time you need to think about any answer that you're going to give, okay?

A All right.

Q I know it's kind of confining, isn't it, but it's just necessary. All right?

A All right.

Q Now, you said that you see yourself fitting more into that second category. Is that because—we've already discussed how you feel about the death penalty. Is it because of your possibly serving or hesitance to serve on the jury itself, or just what is it?

A No. It would be actually the weight of, I guess, thinking about the death penalty and that would be the real thing behind it, I guess. I wouldn't have any problem serving on the jury, I don't think.

[285] Q You think you would have some problem?

A No, I don't think I would.

Q Oh, you don't think you would. Okay. Well, here's the thing. We have to rely—every one here has to rely on every thing you tell us and when you say—again, when you say probably, I know that's probably how—you see, I just said it there. I guess that's how I would answer the question, too, if I had some reservations, but every one here has to rely now on what you're going to do, within the law, of course, and based on the evidence back when you're on the jury. It would be terribly unfair to either or both sides, if some prospective juror said, "Well, maybe I could do this," or

"Maybe I could do that." and then to find out later on that person couldn't do that, you know, under the law, follow the law, when they're actually on the jury. We've got to rely now on what you say. Are you saying that you feel you could?

A Yes, I could.

Q All right. Again, I want you to understand that I'm not trying to talk you into any position, okay?

A No.

Q So you feel that you actually could serve on this type of a jury?

A Yes.

Q And understanding now that in years past with regard to the death penalty—I think you know and it's common knowledge that for many, many years—I say many, many years, ten or fifteen years, maybe more than that—no one was executed, I believe anywhere in the United States for about ten or fifteen years even though death penalties were handed down—

MR. CUNNINGHAM: Your Honor, we'll object to that. What the law was ten or fifteen years ago has no relevance to what we're doing right now.

THE COURT: I'll overrule, Mr. Cunningham. I think you're making a good point, though. Overruled.

Q The point I'm trying to make is, we would expect, as I'm reasonably sure you [287] understand at this point, if a verdict were to result in this case of a sentence of death, a juror should realistically expect now, in 1986, that that sentence would be carried out, whereas years ago, you might have been on a jury and said, "Well, they're not executing anybody. You know, we're getting death penalty cases and hand down a verdict, but no one is being executed." You know, it's kind of like who cares or what's the difference, he's never going to be executed.

Do you understand that you should reasonably expect that, if you were to return a verdict that resulted in the death penalty, Mr. Miller-El, in this case, would be taken to Huntsville, Texas at some point in time and given a lethal injection and executed under the law. I think you understand that, do you not?

A Yes.

Q I mean, the seriousness of the situation?

A Yes, sir.

Q Knowing that, do you feel you still could serve on this type of a case?

A Yes, I could.

[288] Q All right. Now, let's talk a little bit about capital murder. You understand, when we talk about murder, the offense of murder is part of the offense of capital murder. Let me explain that. We have an offense known simply as murder under the laws of this state. Murder is a situation where one person, knowingly or intentionally, causes the death of another individual and that's done without any legal excuse or any legal justification, all right? But not all murders—murder is not a capital offense. You can't receive the death penalty in Texas just for murder. Am I making myself clear, Mr. Bozeman? To be eligible for the death penalty, you must commit murder under a certain set of circumstances or you must murder a particular class of individual. I'm sure you know some of what I'm talking about.

For example, if I murdered—if you murdered me outside in the hall here because we get in an argument, you couldn't receive the death penalty for that or vice versa, if I killed you. All right? Now, if I was a police officer or a fireman in the line [289] of duty, that's a capital murder. Do you see what I'm getting at.

A Yes.

Q —or if you kill a jail guard or kill someone while you're escaping from a penal institution, a jail or penitentiary,

things of that nature. If you kill a number of people in one episode, that's a capital murder. If you kill someone for hire, it's capital murder. if you commit murder also in conjunction with the commission of another very serious felony, such as we've alleged here, murder during a robbery—in other words, murder plus, murder during a burglary, murder during a rape, arson, kidnapping—do you see what I'm getting at?

A Yes.

Q Murder plus. We have to prove both the murder and the aggravated offense, robbery, burglary, rape and so forth. Then murder, which is a first degree felony, is then elevated up the level of a capital offense for which you receive only the death sentence or a life sentence depending on certain factors.

Now, let me ask you: How does that square with your way of thinking, sir, [290] generally of what a death penalty case ought to be, depending upon the facts? Do you think those are the types of offenses that you feel, depending on the facts and circumstances, the Defendant's background, the way the crime was committed—do you feel those are the types of cases that the death penalty ought to be in order for or would you add to that or subtract from it, would you modify it in some way?

A No, I would say yes. Yes, those are the offenses.

Q Okay. Would you add to that? I know you've given it some thought, but do you think you would add something to it? Some people say, "Well, they ought to get the death penalty for sexually abusing little kids.", you know, at least the possible death penalty for it, maybe not in all case, but it ought to be available, or selling dope and getting little kids hooked on heavy dope or beating up and abusing old people and stuff like that.

A I don't believe those should be.

Q Okay. Would you pretty much limit it the way it is?

A Yes, I would.

[291] Q All right. Now, you understand that the trial of a capital murder case is conducted pretty much in the same fashion as any other case, any other criminal case. That is, it's conducted in two parts. The first part deals only with whether the person is guilty or not guilty. The State has the burden of proof. We must convince you beyond a reasonable doubt that the Defendant is guilty, in which case, you find him guilty. If we don't prove that, you find him not guilty. It's as simple as that. If you find him not guilty, the trial is over and everybody goes home. If, on the other hand, you're convinced beyond a reasonable doubt that the Defendant is guilty of capital murder as he's charged here, then we go on with the second part of the trial. You may hear additional evidence to aid you in the second part of the trial and you may not. Either side or both sides can bring you additional evidence, but no one is under any obligation to bring you any additional evidence. You may be in a position where you would decide the answers to the questions, which we'll talk about in a minute, on the [292] basis of the evidence that you received in the first part of the trial because the law does allow you to do that.

Now, the second part of the trial, under the old law, up until about fifteen years ago, I guess it was, or somewhere around there, after the jury heard all the evidence, the jurors would go back and actually directly decide should a person get the death penalty, should they get a life sentence or should they get some number of years. If that's the way you felt and you felt, on the basis of the evidence, that someone ought to die and all the other jurors agreed agreed, you wrote in death or life or some number of years, okay?

Now, that changed about some fifteen years ago—maybe not that long ago. Instead, you don't make that decision directly. You make the decision indirectly on the basis of the

answers to three questions that you're called upon to answer and, you see, the law requires the judge to take an automatic and mandatory course of action. Am I making myself clear?

A [293] Yes.

Q I think the Judge explained this rather adequately the other day, but I just want to go over it again. You understand that it boils down to this: Just as we had the burden of proof in the first part of the trial to convince you that the Defendant is guilty and, if we proved that, you unanimously found the Defendant guilty, the same thing holds true for the second part. We have the burden of convincing you, since we're seeking the death penalty, that those questions should be answered yes. If we do, your oath as a juror will require you to answer the questions yes which you know, three yes answers or all yes answers, means an automatic sentence of death. Judge McDowell has no power under the law to override or change your verdict. You write a letter to him, basically. Three yes answers is automatic death. He can't say, "Well, I disagree with you. I'm going to give him a life sentence."

The same thing would hold true if you answer one or more of the questions no, an automatic life sentence. Whether the Judge agrees or disagrees, it doesn't matter. He [294] will follow that particular order that you give him based on those answers. Okay? Any problem with that procedure?

A No.

Q Okay. Now, let's look at the questions very briefly. Take whatever time you need, Mr. Bowman, to look over those questions and we'll talk about them in just a minute.

A (Juror complies.)

Q Did you get a chance to read all three of them?

A Yes.

Q Did they cause you any problems at all or do you have any questions about any of the three questions?

A No.

Q Do you understand, as I said earlier, that we have to prove those to you. We have to bring you evidence or there has to be evidence presented during the trial that would convince you that those questions should be answered yes beyond a reasonable doubt?

A Right.

Q Is there any reason why you couldn't—allowing that I cannot go into the [295] evidence of this particular case. We're just talking in generalities, sir. Is there any reason why you couldn't answer that first question yes or no depending upon the type of evidence you received, you know, whether someone acted deliberately with the reasonable expectation that the death of somebody would result? Any reason why you couldn't answer that question yes or no?

A No, there's not.

Q Can you see that the type of evidence you would probably need to receive to answer that question would be given to you in the first part of the trial when you learn about how the offense was actually committed and what role the Defendant had?

A Yes.

Q Okay. Question number two, does that cause any problems at all? That kind of looks toward future behavior, doesn't it—

A Yes.

Q All right.—you know, is there a probability that he would commit some criminal acts of violence that would constitute a continuing threat to society. Do you think [296] that question can be answered? Well, let—

A Yes.

Q —me put it this way: You know it can—you think it can?

A Yes.

Q What sort of evidence do you feel would be valuable to you? If you could just tell us, what do you think you would want to know about somebody that would aid you to answer that question yes? What would be the most valuable to you?

A I would probably want to know what he's done in the past and the degree of violence that was involved in those acts.

Q Do you think that would aid you?

A Yes.

Q Do you think, of course—and it's probably reasonable that what you learn about what he did during the actual commission of the crime, actually before the crime in preparation for it, during the crime itself, and then maybe how he reacted afterwards?

A Yes.

Q Do you think that's a pretty good barometer sometimes, how a person reacts after [297] a crime, either remorseful and contrite or are they just kind of nonchalant about it and couldn't careless?

A Yes.

Q Do you think that kind of gives you some insight into what type of person you're dealing with and what—you mention this thing earlier about rehabilitation. You will notice that there is nothing in any of these questions about rehabilitation?

A No, there's not.

Q All right. Do you understand that you're bound, just like we're bound, by these three questions? Do you feel that your personal feelings about rehabilitation would interfere in any way with the answers to those questions or do.. you feel number two maybe looks towards rehabilitation, although it doesn't use that word rehabilitation or rehabilitate?

A I guess it's like you were saying. It would depend on the demeanor of the person, you know, that actually committed the crime, whether he would actually—or there was a chance for him to be rehabilitated or not.

Q All right. You said earlier, if [298] you thought there was a chance that someone could be rehabilitated, you didn't think they should receive the death penalty?

A Right.

Q Let me just ask you—and I don't mean to play word games with you because a lot of times it sounds like that's what we're doing, especially these questions. You see, the Judge can't further define these questions for you. He can't give you any guidelines and neither can I, for that matter.

A Right.

Q He certainly would be in a better position, but he can't. The law does not permit him to do that and the lawyers can't, either.

A Okay.

Q But do you feel your feelings about rehabilitation would in any way conflict with your answering that question, number two?

A No, I don't think they would.

Q Now, number three is a question that may or may not be given to you it depends on whether or not some evidence is raised by any kind of provocation. Can you see [299] how that question could be answered yes or no depending on the type of evidence you receive?

A Yes.

Q Let's shift gears for just a second and let me back up on one thing. Do you remember what I said, years ago in a capital case, the jury was actually expected to express their own opinion as to whether or not somebody should live or die. You know, if you had a particular feeling, as you sat over here and listened to the evidence, he let you voice that, "I think that guy ought to die." or "I think or "I think he ought to get life." or "I think he can be rehabilitated.", whatever the case may be. Do you understand that you can't do that now?

A Yes.

Q The law expects that these three questions be inserted between you and the Defendant in a death sentence or a life

sentence, that you put aside your personal feelings and be rather—I hate to use the word. It may be inappropriate, but—pretty scientific, I guess, just look and see if the proof is there, if it measures up, [300] measures up to an answer beyond a reasonable doubt. If it does, answer the question yes. If it doesn't, you answer the question no, regardless of your personal feelings. Can you see—I'm not saying that this would ever occur, Mr. Bozeman, but can you see how you might be on a jury and you might have a personal desire after you heard the evidence, a personal desire that the person would die or—a personal desire that the person should receive a life sentence? But yet, you see, when it comes time to answer the questions, let's say if you're intellectually honest with regard to answering the questions—let's say you're on a jury and you say, "Well, I think the guy ought, to die after I've heard this. This is horrible. I think the guy ought to die. It scares me, the thought of him being out on the streets again." But then you look at question one or two or three and actually, in all honestly, you say, "Well, as much as I want it done, the proof is just not there in all honesty. I'll have to answer one of those questions no." Could you go ahead and do that knowing it would result in a life sentence and [301] not a death sentence?

A Yes, I could.

Q Let's flip that over. How about in a situation where you're on a jury and you say, "Well, this is a capital murder technically, but I don't think this is the type of capital murder that someone ought to die for." Yet, on the other hand, when all the evidence is in, you see that those three questions, beyond any reasonable doubt, should be answered yes, knowing full well that will result in the execution of somebody who you personally don't desire to be executed—do you see what I'm getting at?

A Yes.

Q Could you go ahead and do that, in all honesty?

A I don't know. I would like to think I could, but I don't think I could. If I didn't feel like he deserved it, I don't think I could go for the death penalty.

Q Okay. We need to pause here for just a second because, obviously, you can see how crucial and critical that is to all of us here. I said, I'm not going to yell at you or [302] quarrel with you or try and talk you into or out of anything. I want to make sure you understand that. I think you're being honest with us and I know you've given it some thought. I just want to be sure. As I said earlier, we're going to have to pin you down on your position. And bearing in mind that I believe you have given it some thought since you were down here on Monday—you have, haven't you?

A Yes.

Q All right. I believe you just told us, that if you were in a situation where you had a personal feeling that a person—you know, we know you're not a robot. We know that, when you sit over here, you're a human being and you're prone to having personal opinions about certain evidence or the desire of a particular situation. Are you saying; that if you, in all honesty, were on a jury, on a hypothetical jury, and you, in your heart, felt that person should not die, yet when you went to answer these three questions, even though, let's say, intellectually there was proof to satisfy you, number one, beyond any [303] reasonable doubt, he acted deliberately and with the reasonable expectation that someone would die, you would have to answer that question yes, and as far as number two, as much as you didn't want to answer that one yes, you would say, "Yeah, I want to be honest about it. I think there's a probability he probably would commit some criminal acts of violence, in which case the law would expect you to answer the question yes, and let's say, in number three, there's no provocation, the poor victim, he didn't do anything to provoke anybody, I'd have to answer that one' yes, yet when it comes down to looking at those three questions and knowing that yes, yes, yes, is the same as writing death, you

understand that the net effect is the same and that's contrary, completely contrary to what you desire, in honestly, Mr. Bozeman, if you're kind of gut—wrenching about it now, as we sit here now, knowing what kind of pressure would be on you—

MR. CUNNINGHAM: Your Honor, we'll object to that last statement. There's no indication and there's no evidence and it's [304] outside the record and it's speculating on whether or not that would be any pressure.

THE COURT: I'll overrule. I'll let Mr. Bozeman make up his mind on that. I think he's answered all the questions I've heard so far very thoughtfully and intelligently, Mr. Bozeman. if any question posed by a lawyer doesn't seem understandable to you, don't hesitate to say so. I'll overrule the objection, Mr. Cunningham.

Q Do you see what I'm getting at? You're not under the same kind of pressure, reasonably, that anyone would understand would be on the situation when you're making a life or death decision back in the jury room with eleven other people. Do you really feel you could put aside your personal feelings or, as you said earlier—you said you didn't think you could?

MR. CUNNINGHAM: Your Honor, we'll object to that last [305] statement. He's gone through those three questions and he said he could answer yes if the facts and circumstances proved beyond a reasonable doubt that the answer should be yes. He said that several different ways.

THE COURT: I'll overrule, Mr. Cunningham. I'll let him answer the questions. You might want to reask it, Mr. Macaluso, to make sure it's clear to Mr. Bozeman. I think he said a moment ago that he might have some problems with it because he would be hesitant about someone receiving the death penalty.

MR. CUNNINGHAM: Your Honor, I would hope that every juror that was sent over there will have some problems with it. The issue is, if he hears the proper facts and circumstances beyond a reasonable doubt, that the answer should be yes to number one, that he would [306] do that. The same thing for number two and the same thing for number three.

THE COURT: I agree. With that statement of law, I'll let Mr. Macaluso reask the question, if he wants to, in case Mr. Bozeman needs to be refreshed.

Q I can barely remember the question. I think it came down to, you said that, if you felt one way, but the proof was another way—

A I'd have to vote with the proof, you know, no matter how I felt. If the answer was yes, then I would have to put yes no matter how I felt about it.

Q Let me shift gears here away from, what we call—we've talked about capital murder and mandatory life or death—and—talk about a situation that I'm not saying would necessarily occur in this case or any other case, for that matter, Mr. Bozeman, but we need to discuss it now because we have the opportunity.

Imagine for a second that you're [307] on a capital murder jury and let's say it's a capital murder that is allegedly a murder during a burglary, let's say, because it's a type of capital murder, or it could be during a rape, I guess. Let's say that you heard all the evidence in the first part of the trial and you and the other jurors were convinced beyond any reasonable doubt that a murder occurred. There's no doubt about it, but you didn't hear any evidence about a burglary or you have a reasonable doubt. You're just not sure about whether that burglary—it was actually murder during a burglary. Do you understand, if that were to occur, you couldn't convict someone of capital murder because the State in that case didn't prove a capital murder to you, did they?

A Right.

Q All they proved was what?

A Was the murder.

Q You got it. In such a situation you find—the Defendant not guilty of capital murder simply because it wasn't proven to you, both parts were not proven to you. You find him guilty of what was proven to you and that's murder, as you've already said. Were that to [308] occur—imagine for a second that you're in a hypothetical situation now where that happened. The range of penalty for murder is altogether different. It's no longer mandatory life or death. Instead, it's the broadest range of punishment provided for under our penal code and our penal system.

Let me just ask you—let me talk a little bit about what murder is. I said earlier that murder is a situation where one person knowingly or intentionally causes the death of another individual. Okay. Let me go on to explain, so we're clear on this and you're clear on this, that that is a situation where this homicide occurs, this killing occurs, without any legal excuse or any legal justification whatsoever. All right? By that I mean, we're not talking about a situation where you believe someone acted in self-defense, whether it's, if I kill Mr. Nelson or you kill me because you think you're in fear of serious bodily injury reasonably or death—and the law gives you the right to kill me. You could be charged with murder, but it wouldn't be murder if the jury believed that [309] you acted in self—defense or I did. Do you see?

A Right.

Q Forget about self—defense when you talk about murder. The same thing would hold true for, if you believed it was an accident. Now, I could kill Mr. Nelson or you could kill somebody. It was an accidental thing. You could be charged with murder, but if the jury believed it was an

accident, it's not murder. A person has to be found not guilty just as he would be if you believed he was acting in self—defense.

The same thing would hold true if you thought someone was insane. As much as people have reservations about the insanity defense, if you—honestly believe or have a reasonable doubt that somebody was insane at the time of a homicide, you can't convict—him of murder.

Lastly, don't be thinking about a situation where someone acts in the heat of sudden passion. As an example, somebody comes home and finds out, God forbid, that their child was sexually abused or something like [310] that happened, something bad, and he picks up a gun and goes into a rage and goes down the street and kills somebody. Do you see what I'm getting at?

A Yes.

Q That's a homicide, but that's a lower grade of homicide. That's not murder, if you believe that, if you're on a jury. Let's divorce our thinking from those sorts of things and let's talk about a situation where one person knowingly or intentionally causes the death of another. I can't give you any other examples. Let me ask you—I gather from what you said, of course, and it's reasonable that anybody would feel this way, that you think murder is a very serious grade of offense.

A Right.

Q Let me ask you: What do you personally feel ought to be the minimum punishment for somebody committing a murder, sir?

MR. CUNNINGHAM: Your Honor, we will object to the form of the question in asking this prospective juror what the minimum [311] punishment is without telling him what the state legislature has set as the minimum punishment, that being five years to ninety-nine or life .

MR. MACALUSO: I intend to do that, judge. I'm just asking the jury what he—

THE COURT: Well, go ahead. I'll overrule the objection. I understand.

Q What do you personally feel ought to be the minimum when somebody commits a murder and it's not self-defense and not an accident and not insanity and not in the heat of sudden passion?

MR. CUNNINGHAM: Your Honor, we would still object to the f o form of the question. It's an improper question, the way he has asked the juror.

THE COURT: I'll overrule, Mr. Cunningham, in this particular situation. I'll overrule and say no more.

[312] A I would say twenty years, I guess.

Q You understand that in a murder case you would be allowed to consider all the facts and circumstances surrounding it, but I want you to understand that you still exclude those four different categories we talked about. Am I making myself clear?

A Yes.

Q Now, Mr. Cunningham is right that the range of penalty is, as I said earlier, very, very broad to encompass a wide variety of situations. As I said earlier, we want to know how Mr. Bozeman feels.

The range of penalty for the offense of murder is, under the law, as low as five years and all the way up to ninety-nine years or life. The law does allow the jury to consider all of the facts and circumstances surrounding the situation where a person murders another person. It boils down to this, Mr. Bozeman, I just want to know what Mr. Bozeman's feelings are and you said that twenty years ought to be the minimum; is that correct?

A Yes.

Q Mr. Bozeman, let me ask you—I [313] can't give you a fact situation, sir, "Well, Mr. Bozeman, what would you do here?" or "What would you do here?" "What if this happened, what would you do here?" That's not proper for us to do that, either side to do that. Are you saying, sir, that you would ever feel, knowing yourself, it would ever be proper under any facts and circumstances where one person murders another person, absent of those other circumstances, to ever give a sentence as low as five years? Do you feel it would ever be proper under any circumstances?

A No, not if it was murder.

Q As I said earlier, Mr. Bozeman, it's not my position, my responsibility, or my desire to talk you into or out of a position and I think it holds true certainly for Mr. Cunningham and Mr. West when they talk to you. As I said from the very outside, we want to know how Mr. Bozeman feels. Let me just make sure we're clear on this. Are you saying that you—and we know you haven't heard any facts surrounding any hypothetical murder and we can't give you any, but are you telling us, telling the Court, telling the Judge, that you [314] do not feel it would ever be proper under any facts and circumstances, whether you can imagine them or not, to ever give as low as five years for a situation where one person knowingly or intentionally causes the death of another, no legal excuse, no legal justification whatsoever, no insanity, no heat of sudden passion, no self-oefense, no accident, you're saying you could never do that?

A Yes, I could, but, like I say, it would depend on the circumstances. Say, the person who was doing the commission of the act, say he panicked and he was trying to, you know, flee the scene and something happened that caused the death, you know, that really it was indirectly. It was his fault, but he didn't do it with malice, then I could say, yes, probably five years could be in order.

Q Bear in mind that we're talking about a knowing or intentional act.

A Oh, no, I don't think so. No.

Q Okay. Well, you see, you said, "I don't think so." Are you saying you could or you could not, sir?

[315] A (No response.)

Q For the knowing or intentional killing of another human being?

MR. CUNNINGHAM: And he believed from the facts and circumstances of that case, that that was a proper verdict, Your Honor.

A Yes.

Q Yes, you could or you could not?

A I could.

Q You could?

A Yes.

Q For a knowing or intentional—

MR. WEST: Your Honor, this is being repetitious. We've gone over it two or three times. He's already answered the question that he could, under the proper facts and circumstances as he deemed them to be, he could give a five year sentence. This is getting to be redundant at this point.

MR. MACALUSO: Judge, I don't mean to be repetitious. I [316] did not quite understand the last response and I just want to clarify it.

MR. WEST: Judge, we can have it read back.

THE COURT: I asked him and you can ask him one more time, Mr. Macaluso.

Q Just so we're clear, are you saying you can, sir, or you cannot?

A Yes, I can.

Q Okay. I am about out of time, Mr. Bozeman, but let me simply ask you: Do you have any questions of us at all at this time?

A No. No, I don't.

Q Sir, do you know of any reason whatsoever, whether I touched on it or not, why you feel you could not be a fair and impartial juror in this type of case?

A No.

Q Any reason that you know of, sir, why you could not sit in judgment of a fellow human being?

A No.

Q Okay. Anything that the Judge [317] covered with you the other day that you have any questions about, in any procedure that is involved in the trial of a case such as this?

A No.

Q Any problems at work or anything like that, family schedule?

A No.

Q You're a happy single man, aren't you?

A Yes.

Q You've been very polite and very kind and open and honest with us, Mr. Bozeman, and I appreciate it. That's all the questions I have for you, sir. I know that Mr. Cunningham and Mr. West will have some questions for you at this time. Thank you, very much, sir.

MR. MACALUSO: I'll pass at this time, Your Honor.

THE COURT: Thank you, Mr. Macaluso.

[318] EXAMINATION

BY MR. CUNNINGHAM:

Q Mr. Bozeman, as the Judge and Mr. Macaluso indicated to you, my name is Brice Cunningham and, along with Mr. West to my immediate left, we represent Mr.' Miller-El in this case. I'd like to ask you just a few questions concerning your questionnaire.

How long have you been at the University of Texas at Dallas?

A I've been there about six months.

Q Where were you employed before that?
A Cam Audio.
Q How long were you with Cam Audio?
A I was with them a year.
Q Are you still attending college?
A No, I'm out right now.
Q That is at Denton, the University of Texas—no, North Texas State University? A Right.
Q Mr. Bozeman, you indicated that you read the Dallas Times Herald; is that correct?
A Yes.
[319] Q Every day?
A Yes.
Q Have you read anything that may purport to be what the facts are in this particular case in the Dallas Times Herald?
A No, I haven't.
Q If you did, you would know that you would have to put that out of your mind, if chosen as a juror on this case, and disregard that because that is some hearsay that reporters are putting in the paper. All the evidence will come from where you're seated there now and in the physical evidence?
A Yes.
Q You could do that if chosen as a juror, sir?
A Yes.
Q The same thing would apply to radio or TV?
A Right.
Q You answered yes to a question that, either you, your spouse or any member of your family or a close friend ever studied law. Who was that, sir?
A I have a cousin in Los Angeles who [320] works for the DA's office.
Q Do you communicate with your cousin in Los Angeles?
A No. I haven't for a few years.
Q Does he try criminal cases or civil cases or do you know?
A I think she's a criminal—

Q Oh, it's a she. Sorry. What is her name?
A Joleen Harkess.
Q When is the last time you saw her?
A Oh, it's been about six or seven years at a family reunion in Longview.
Q And the person that studied sociology is that you?
A Yes.
Q You also answered that you were interested in the outcome of a criminal case in Dallas County. You said yes, talking about T. Cullen Davis. That was just a passing interest as most people were at the time; is that true, sir?
A Yes.
Q And whatever you may have read or heard, either on the TV or the radio or in the [321] papers, you could put that out of your mind and, if you're chosen as a juror on this case, base your decisions totally about the facts and evidence that you hear?
A Yes.

MR. CUNNINGHAM: Pass the juror.

THE COURT: Mr. Bozeman, let me ask you, if you would, sir, to go either in the jury room or the hall. Why don't you wait out in the hallway while we take up a law matter and we'll get you back in just as quickly as we can, one way or the other.

(Whereupon, Mr. Bozeman, left the courtroom, after which the following proceedings were held.)

THE COURT: I thought it might be better to remove the juror in case there's any discussion about what the State did and what the defense did. Mr. Macaluso, the juror has been [322] qualified.

MR. MACALUSO: Yes, sir. We'll exercise a preemptory challenge at this time, Your Honor.

MR. CUNNINGHAM: I want to ask him one other question, Your Honor.

THE COURT: Ask Mr. Bozeman?

MR. CUNNINGHAM: Yes, or the Court can. I just want to put it in the record his race.

THE COURT: The Court will take note of the fact that he is a black male and, according to the juror's sheet, he's twenty—eight years old.

In view of that, Mr. Macaluso, is the State exercising this preemptory for racial reasons or some other reason?

MR. MACALUSO: May the record also reflect that this is the first black that has been questioned by the State and the [323] defense.

THE COURT: Mr. Macaluso, I don't think the law requires the State to state its reason, but I think it is appropriate to ask you if it is for reasons other than his race.

MR. MACALUSO: No. I would state without hesitation or reservation that it is not, Your Honor. Although not required to, I would state at this time that I have reservations and I'm exercising a preemptory challenge in this particular situation because of the general answers of the venireman, Mr. Bozeman, and specifically with regard to his feelings on the death penalty, his feelings and his position with regard to rehabilitative aspects of an individual charged with this sort of crime, his obvious hesitation, which is on the record, with regard to being able [324] to override his personal feelings with regard to somebody receiving a life sentence, and that he also said earlier that he felt the prior pattern of conduct would not necessarily be enough to convince him that a person was worthy or entitled to a death sentence, and other matters.

THE COURT: Let's bring Mr. Bozeman back in, please.

(Whereupon, Mr. Bozeman was returned to the courtroom and the following proceedings were held.)

THE COURT: Mr. Bozeman, come on back in, please, sir, if you would. Mr. Bozeman, you have been excused from service in .this case, but I want to thank you and the lawyers want me to thank you for your attendance and your patience in answering these questions. You've very conscientiously answered the [325] questions and I hope you have good luck in your college career. I hope you get to finish college. It looks like you're working at it. Good luck to you.

(Whereupon, Mr. Bozeman left the courtroom, after which the following proceedings were held.)

MR. NELSON: Judge, during the last voir dire by Mr. Macaluso, Mr. West made an objection with reference to things being redundant or repetitious during voir dire. The Court has placed a time limit on us and it is—our feeling, that as long as we work within that time limit, we can ask things as many times as we want to ask them. I don't think it is a proper objection and we would ask that the defense be instructed not to make that objection again in the presence of a juror.

* * * *

[397] BILLY JEAN FIELDS, called as a jury panel member, having been dull sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Fields. Let me begin by reintroducing everyone here so you're acquainted with everyone here at the table. My name is Paul Macaluso and to my immediate left is Mr. Jim Nelson.

MR. NELSON: Hello.

Q Along with Mr. Norman Kinne, who is seated right over here to your far right, as he was introduced yesterday. We are three assistant criminal district attorneys here in Dallas, Mr. Fields. We work for the district attorney, Henry Wade. We've been designated as the lawyers to represent the State of Texas in this particular case.

Now, to Jim's immediate left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Fields?

[398] Q And to Mr. Cunningham's immediate left is Mr. Royce West.

MR. WEST: Mr. Fields, how are you doing, sir?

Q Both Mr. West and Mr. Cunningham, you may recall, were introduced to you yesterday—not yesterday, Monday I guess it was. I lose track of time. They're the defense attorneys who have been appointed by Judge McDowell to represent the accused Defendant. His name is Thomas Joe Miller-El. Let me ask you if you can see from where you are—you may have to lean forward a little bit. He's in the powder blue suit down there. Can you see him?

A Yes.

Q The reason why I've reintroduced you to everyone here is to let you hear our names once again and to reacquaint you with the roles that we all play in this case and then simply to ask you if you either know or have heard of any one of us other than from the other day when we were introduced?

A Well, since I was here Monday, I heard about the case on the radio.

Q Okay. Could you tell us a little bit about it? What did you hear?

A Well, just a spot announcement that the case was fixing to be heard and it would probably take three weeks to seat the jurors.

Q What radio station was that, if you recall?

A KRLD.

Q Did they go into anything that was purported to be the facts or did they maintain the facts of the offense?

A It was just an announcement.

Q Did they give any information at all over the radio about where it happened or allegedly happened or who was involved? Let me ask you this, sir: Was there anything that you heard on the radio or anywhere else, if you've read anything, for that matter, or talked to anybody, that you feel would influence your decision in this case or keep you from being a fair and impartial juror?

A No.

Q Okay. You could put that aside, whatever you heard?

[400] A Correct.

Q Okay. And even if you couldn't, it wouldn't affect your deliberations; is that correct?

A No.

Q Okay. Mr. Fields, as you well know at this point, you are a prospective juror in this type of case. The law allows us to talk to you individually like we're doing now instead of talking to you in front of all the other people. I believe you've been on a civil case before; haven't you?

A Yes.

Q Did the lawyers talk to you individually during that jury selection?

A No.

Q Typically they will talk to you and you have to answer questions, but you have to do it in the presence of all the other jurors. We've got a little bit of privacy here today and that's the way it is in a death penalty case because we want you to be as relaxed and feel as free to express yourself as you possibly can without having a bunch of—you know, forty or fifty other strangers [401] critiqueing everything you have to

say about some personal things. Let's take advantage of that, if we can. You look like you're pretty relaxed, anyway, but if you aren't, I'd invite you to be.

A I'm relaxed.

Q Sure. Remember that there are no right or wrong answers, sir. No one is going to quiz you about this. No one is grade you on your answers. We dust want to know how you feel and, in some instances, how you feel about certain things. Okay?

A Yes.

Q And if you're just honest with us and tell us how you honestly feel and, if we ask the right questions, then we'll be doing our job and so will you. No one is going to talk you into anything or talk you out of it or try to. I'll guarantee you that. No one. is going to argue with you, quarrel with you, pick at you, criticize you or anything like that. We want to know just honestly how you feel, seat of the pants. If you have a question at any time, whether it is while I'm talking to you or the other lawyers are talking to you, by [402] all means ask the question or make the statement if it's something you need to tell us that we haven't covered, okay?

A Yes.

Q Now, let me tell you what the State's position is in this particular case. You know that the Defendant is charged with capital murder, the,most serious level of offense under the laws of this state. You know that a person who is convicted of capital murder can receive only one of two possible penalties. One is a sentence of death and the other is a sentence of life. There is no in between. It's one or the other.

Now, let me tell you what our position is, that is the position of the lawyers for the State of Texas in this particular case. Mr. Fields, we are actively seeking the death penalty in this particular case for Thomas Joe Miller-E1. The only reason I tell you that is, is to be fair to you and put you on

notice right from the very beginning as to what our posture is and what our position is. That is, we intend to be able to provide a jury, once it's selected—and we only have [403] one juror so far—with both the type and the quality of evidence so to convince them beyond any reasonable doubt whatsoever that Mr. Miller-E1 is guilty exactly as he is charged in this indictment and nothing less.

In the second part of the trial, in the penalty phase of the trial, once again, we intend to provide a jury—that would mean you, of course, if you are on it—with the type and the quality of evidence that would convince them beyond a reasonable doubt that the questions should be answered yes in each instance which, as you know, as the Judge told you the other day, would result in the Judge sentencing the Defendant to be executed. Am I making myself clear?

A Yes.

Q Now, that is our position. Our position really doesn't matter because, o course, ultimately it's the position of the jury and ultimately based on the evidence. I want you to know what we're seeking and we're going about it, okay?

A Yes.

Q Now, do you have any questions to [404] this point, sir?

A No.

Q Okay. Good. With those preliminary remarks out of the way, let me just ask you, Mr. Fields, although you did indicate here on question fifty-six with regard to do you believe in the death penalty—they don't give you a whole lot of room and you don't have a lot of time to think about it or to respond, but would you just tell us, sir, in your own words, just how you feel about the death penalty and capital punishment and your ability to actually serve on a jury of this type and actually render a decision that could result in the death of the Defendant in this particular case?

A Well, I also indicated on there that I was active in a church and, according to the way I personally believe, which may not necessarily be according to my denominational stance, God's word, you know, provides for the State to serve in his behalf. According to the Old Testament, people were killed if they violated His law. In its extended service, the State represents Him if the crime has been [405] committed and death is warranted.

MR. CUNNINGHAM: I'm sorry. I didn't get the last part.

A I said I feel that the State is God's extended person. In other words, the State represents God in today's time.

Therefore, if the State exacts death, then that's what it should be.

Q You said there was some conflict possibly between—you said what the church believes, what your religious beliefs are—

A Well, I said me personally. There are people who are Catholic, Baptist and whatever else, that don't believe in the death penalty. They don't think it's God's will that people should be executed. They think He's a very loving God and He's not one that punishes. I don't believe that way.

Q So you have no philosophical reservations about the death penalty or any religious reservations?

A No.

Q Mr. Fields, do you feel that it serves a particular purpose?

A Does it serve a particular [406] purpose?

Q Do you think the death penalty or the imposition of the death penalty; do you think that serves a purpose?

A Yes.

Q How do you view that?

A Well, I think that, if an individual knows that there is the possibility of death awaiting him or her, maybe they will think twice before they decide to premeditate—

Q In other words, you feel—I'm sorry. I didn't mean to cut you off.

A I just said that they would think twice about what they're going to do.

Q In other words, you feel it may well be a deterrent to other people, to deter them possibly from committing that type of offense?

A Yes.

Q Have you ever felt differently about the death penalty?

A No.

Q You're forty—six. Are you folks alive?

[407] A Yes.

Q Do you know or could you hazard a guess what their position would have been about the death penalty?

A No, I don't know.

Q You're married to Mrs. Fields. Would you know or could you hazard a guess about—

A She feels basically the same way I do.

Q All right. Let me ask you: What sort of offenses do you feel, personally—just picking your own brain and just searching your own soul, what sort of offenses do you feel the death penalty ought to be reserved for?

A Well, the taking of a life, basically—

Q Do you feel strongly about that?

A —but then—well, yes. Now, of course, there are other crimes that fall in the same category and that would be rape and the misuse of an individual by another for his own personal gain where this individual's basic freedoms were hampered.

[408] Q You said it should be reserved, in your opinion, for murder type offenses?

A Murder, rape and slavery, I suppose you could say it that way, if a person's civil rights are being forced out of play.

Q Anything else you can think of?

A Not particularly.

Q The law largely agrees with you in that respect with the exception of the last aspect that you mentioned. The death penalty in Texas, at least, is reserved for murder—type offenses. You mentioned rape. There is one aspect of that that comes into play, a murder offense is made a capital offense. I'll talk to you about that in just a minute. Under the laws of Texas, the only offense for which you can receive the death penalty for, even potentially, is for what we call, as you know, capital murder. First you have the offense of murder. That's just called murder. That's a first degree felony under the laws of this state.

A person commits murder if he knowingly or intentionally causes the death of [409] another human being. That's basically what it is, just murder, and you can't receive the death penalty for it. Am I making myself clear?

A Yes.

Q On the other hand, if you commit murder of a certain class of individual or murder under certain circumstances, the murder itself becomes raised or elevated to a level of capital murder. You can receive the death penalty for capital murder. Do you see what I'm getting at?

A Yes.

Q An example of that is, if you commit murder during a rape or murder during a robbery, murder while you're committing a burglary or arson or kidnapping—do you see—murder plus. Or obviously, as I'm sure you well know, if you murder a police officer or a fireman or a jail guard in the lawful discharge of their duties, then you can receive the potential punishment of the death penalty. If you kill—multiple murders, you know, a string of murders in one situation, or if you hire yourself out. There are other areas, but [410] basically, it's either class of individual or murder during a particular situation. How does that square with your way of thinking of what death penalty case ought to be, you know, given the individual facts and circumstances?

A Okay.

Q As I mentioned earlier in my initial, question, do you have any reservations at all about your ability to actually sit on this type of a jury and render a decision, actually make the decision that could result in the execution .of another human being?

A No.

Q Could you do that?

A Yes.

Q All right. Now, let's talk a little bit about the way that the determination is made. In other words, the Judge talked to you on Monday and told you basically how—a criminal trial is conducted here in this state. The trial itself is conducted in two parts. Let me pause a second. Have you ever been down here on jury duty, other than on the civil case?

A No.

[411] Q Well, criminal trials, all criminal trials, whether it be for the lowest misdemeanor or for a capital offense, they're all conducted in two phases or, two distinct parts. We call them two separate trials. The first part deals only with the guilty or innocence of the person who is charged. That's all. The only determination the jury makes is, the person is guilty beyond a reasonable doubt. In other words, has the State proven that he is guilty, proved all that is in this indictment beyond a reasonable doubt, or have they failed to do so. Before you could actually serve on a jury, whether it be a capital case or otherwise, you take a Sworn oath to a true verdict render according to the law and according to the evidence. It boils down to this, if the State proves that the man is guilty, we've proved all the elements of the offense to you beyond a reasonable doubt, your oath requires that you find the Defendant guilty. Just the same, if we fail to prove all the elements in the indictment, then the jury will be required to find the Defendant not guilty. Any problem with that at all?

[412] A No.

Q If we prove it to you, you could be able to find a Defendant guilty, could you not?

A Yes.

Q If we didn't, you would find him not guilty?

A Right.

Q Okay. If you find him not guilty, the trial is over. If you find him guilty, then we go on to the second part of the trial where the actual punishment is now a consideration. Do you see how they compartmentalize that?

A Yes.

Q Okay. In the second part of the trial,you can hear additional evidence to aid you in making the decision you would be called upon to make. Then again, there is no requirement on either side to offer additional testimony. You see, either side can offer testimony, but neither side has to. Am I making myself clear?

A Right.

Q If you didn't hear any more [413] testimony in the second part of the trial, then you would be called upon to make a decision as to the punishment on the basis of all you learned in the first part of the trial. While the trial is in two parts, you see, in the second part of the trial, you can consider all the evidence you heard up to that point, even in the first part. Do you see what I'm getting at?

A Yes.

Q In other words, you're not limited to what you hear in each section. Now, whether you hear additional testimony or not, at the end of the second phase of the trial, it used to be that juries made a decision direct in a capital case whether a person should live or die or receive a number of years. In other words, if you had a particular feeling about it and after you heard the evidence, you thought the person ought to die and the other eleven people agreed, that's how you voted and that's what it was. If you thought it should have been life and everyone agreed with you, everyone on the jury unanimously agreed, then it's life or some number of years, but you made

[414] the decision on a personal basis. You decided personally how the evidence affected you and what you wanted to vote for.

That changed about thirteen years ago and that particular prerogative has been taken away from the jury. Instead of holding the life or death or a number of years on the basis of your personal feelings, instead you're called upon to answer these three questions. It's on the basis of the answers to the three questions that the law requires the Judge automatically to assess a penalty of death or a sentence of life. Am I making myself clear?

A Yes.

Q Now, you know as well as I do at this point that all the answers that are submitted, you—can receive no more than three—and I'm going to let you look at them in just a second. If all the questions are answered yes, then the law requires and would require—and there's no doubt in mind that Judge McDowell would follow his oath, as a Judge of the courts—the Judge to sentence the Defendant to be executed. He can't override your verdict. He may not necessarily [415] agree with your verdict, but you wouldn't know that. He cannot say, "Well, you answered these questions yes, but I think he should get a life sentence." or "I'm going to give him a life sentence instead of the death sentence." He can't do that. If you answer all three questions yes, the Judge will sentence the Defendant to be executed. It's just the same, if you answer on or more of the questions no, you see, whether he agrees with you or disagrees with you, it doesn't matter. He will assess a sentence of life. Am I making myself clear?

A Yes.

Q All right. Now, you know that the State—has the burden of proof in both parts of the trial. We brought the indictment. We've done the accusing and we must also do the proving. The same thing holds true for the second part of the trial. We're seeking the death penalty. We must provide you

and the other jurors with the type and quality of evidence that convinces you that the questions should be answered yes. If we do, then you answer the questions yes. If we don't, you [416] answer the questions no. Any problem with thatl at all?

A No, sir.

Q Okay. Let's take a look over here on the left. There's a number one, a number two and a number three. Take your time and read those, sir, if you would, please, and we'll talk about them in just a second.

A (Juror complies.)

Q Have you had a chance to look at those?

A Yes.

Q Did they cause you any problem right off the bat, any confusion?

A No.

Q All right. You understand that you would only be called upon to answer these questions, Mr. Fields, assuming —let's just set a hypothetical example here. Let's say you're on a capital murder case and you've heard all of the evidence in the first part of the trial and you and. the other jurors agree that the Defendant is guilty. Let's just assume that imaginary case, okay? You've heard all the evidence in the second part of the [417] trial or you've concluded the second part of the trial, whether there was any additional evidence or not. You're back in the jury room and you're called upon to answer these questions. Now, the first question asks, was the conduct of the Defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result. What do you think you're being asked there, Mr. Fields?

A Oh, it's asking—wanting to know if the person who committed the crime did it deliberately, with the premeditated intent to kill.

Q Okay. In other words, you look to the conduct of the individual. I think you can see that probably—you're seeing

the information that you need to answer this question probably when you're learning about the offense itself, how it all happened, what role the Defendant played, and so forth and so on. You decide whether he acted deliberately, was whatever he did, whatever role he played, did he act deliberately. Some people say [418] intentional, but was it deliberate conduct. Did he intend to do it and did he act deliberately. Furthermore, was the act or whatever he did, shooting somebody, knifing somebody, whatever it may have been—and I'm not talking about this case, you understand. I'm just talking about an example, a hypothetical example—was that done with the reasonable expectation that someone was going to die. Can you see how you can answer that question yes or no depending on the facts of the case?

A Yes.

Q Let's go on to number two. What do you think is being asked there, is there a probability that the Defendant will commit criminal acts of violence that would constitute a continuing threat to society?

A Well, this is asking, I think, would the person be classified as a professional criminal or was this just an isolated incident that resulted in the death.

Q What do you think would be the most valuable evidence that you could receive? In other words, if you could say to us, "Mr. [419] Macaluso, this is what I consider the most important. I would like to know this about the individual or know that about the individual", if you wanted to answer that question yes? What can you tell us in that regard? What do you think would be the most valuable thing for you, Mr. Fields, to know about somebody that would enable you to answer that question yes?

A Well, if the individual at the time the crime was committed—if there were individuals who saw what took place or whatever, some type of, you know—an individual or a film or whatever that indicated the person did the crime.

Q Let's just assume that you—understand that you've already found the individual guilty of the offense. Now, you're deciding whether or not there's a probability he would commit future acts of criminal violence. What sort of evidence do you think would aid you, what sort of testimony, what sort of facts, what sort of background, in deciding whether or not this is the type of individual that would probably do something of a criminal nature again?

[420] A Well, typically you would say a history of the person's past actions, but I would think also possibly hearing that individual himself talk to me.

Q Well, you understand—let me just back up a second. You understand that in a criminal trial, no matter what kind of criminal trial, be it capital murder or shoplifting, any person charged with a crime has a right not to testify?

A Yes.

Q Although I have no way of knowing, in any case, whether a Defendant will testify or not, let's assume that the Defendant does not for these purposes. Do you understand that... if the Defendant wants to testify, he can and, if he doesn't want to, no one can make him? Do you understand that, also?

A Yes.

Q If he chooses not to testify, that's fine. That's a right that we all have. You cannot consider that as any evidence of his guilty whatsoever. Do you understand that?

A Right.

Q You can't hold that against him in [421] either part of the trial?

A Right.

Q So it may well be, during the trial, that you may not hear from the Defendant, do you understand that, so wouldn't have that information to assist you. Let me ask you this, Mr. Fields; Do you think you could learn enough about an individual when you learn about the crime itself for which he's on trial, when you learn the dynamics of the crime, the

very spastics of the crime? In other words, what lead up to the crime, what planning was involved, what role did a Defendant had in that planning, if any, what alternatives he could have taken, did he have to commit this crime. I mean, was it necessary or, you know, any stretch of the imagination, doing the commission of the offense itself? Did he have to do this? Did he have to do that? How violent and vicious was it? What role did he play in it? Was he subservient or was he. active in calling the shots, so to speak? Do you see what I'm getting at?

A Yes.

[422] Q What alternatives did he have? What about afterwards, how did he react? Did he show remorse and contrition or was he nonchalant, was he blase, did he care, you know, was it another day at the office, was he the type of person that it was just like swatting a fly? Do you see what I'm getting at?

A Yes.

Q Do you think you could learn enough about an individual when you learn all of those facets of his involvement in a very serious capital murder to tell you to answer that question, yes, there's a probability he would commit some criminal acts of violence in the future? Do you think you could do that?

A Right.

Q I'm not trying to—I just want to know how you feel about it. Don't go along with me. If you don't think so, fine. Do you think you could?

A Yes.

Q You said, also, that you would like to know about his background?

A Right.

[423] Q All right. Other criminal acts and so forth?

A Yes.

Q Let me just ask you briefly: What does that word probability mean to you in that connotation?

A Well, it means is there a possibility that he will continue to lead this type of life, will he ,be rehabilitated or does he intend to make this a life—long ambition.

Q Let me ask you, Mr. Fields, do you feel as though some people simply cannot be rehabilitated?

A No.

Q You think everyone can be rehabilitated?

A Yes.

Q I'm just curious. How would you ever know that there is somebody that—well, you said something earlier, but I can't remember exactly what it was, about whether or not somebody could be rehabilitated in conjunction with one of my questions earlier. You said that would tell you whether or not somebody could possibly be rehabilitated?

[424] A Well, I think you're talking about the fact of whether or not it was premeditated. It may be far—fetched, but I feel like, if a person has the opportunity to really be talked about God and he commits himself, whereas he has committed this offense, then if he turns his life around, that is rehabilitation. I know the State has a program that is supposed to work, but ālso it has a relatively bad record. I feel like when an individual has really been truly reached by someone reading the word of God to him and they are repentant and they do have a real act of contrition, they can be rehabilitated and that's been demonstrated.

Q Let me ask you this, sir—and I don't mean to quarrel with you. I want you to understand that. These questions are very important to all of us and your impressions of these questions. As I said earlier, you're not saying anything right and you're not saying anything wrong. You're just being honest with us. You notice that there is nothing in these questions that directly verbatim addresses rehabilitation. The word is not used there. [425] Of course, I can't tell you what these questions mean. Do you understand that? That's for you to decide. Let me ask you this hypothetically: Do you feel that if somebody, as you just said earlier, if the Defendant—

and we're not talking about Mr. Miller-E1. We're just talking about an imaginary Defendant—were to get on the witness stand and indicate to you that he is repentant and has had this religious experience or conversion or exposure, at least, if you were to believe him, do you feel that you could ever answer these questions yes regardless of the evidence at that point? Could you ever allow this person to ever be executed?

A Yes.

Q I'm just curious. Bow would that square with your feelings about rehabilitation?

A Well, now based on what you said as far as the crime goes, there are only two things that could be rendered, death or life in prison. If for some reason the testimony didn't warrant death, then life imprisonment would give an individual an opportunity to rehabilitate. But, you know, you said that the [426] jurors didn't have the opportunity to make a personal decision in the matter with reference to what I thought or felt, but it was just based on the questions according to the way the law has been handed down.

Q Let's shift gears away from capital murder and let's talk about a situation that I'm not suggesting occurred in this particular case, but it something I have to approach with you at this point because we have the opportunity. Let's imagine again that you're on a jury, a capital murder case. Let's say it's a murder alleged to have been committed during a rape. That's a type of capital murder. Let's 'say you were convinced, along with the other jurors and you don't have any doubt whatsoever that the Defendant committed the murder, but let's say you don't hear any testimony about any rape or you have a reasonable doubt that it occurred during the commission of a rape, you understand that if we expect you to convict.somebody of capital murder, we have to prove both the murder and the rape. Am I making myself clear?

A Yes.

[427] Q We haven't done that, have we?

A No.

Q Not in that example. What you do in a situation like that, you have to, under your oath, find that Defendant not guilty of capital murder simply because we didn't prove capital murder. Do you see? What did we prove?

A You proved rape.

Q No, we didn't prove rape at all. We proved murder.

A Well, one or the other.

Q Right. There's no testimony on rape, but there is testimony on murder and you're convinced it was a murder, so you find him guilty of murder. It wouldn't be capital murder and if it's not capital murder, it's not mandatory life or death. Do you see what I'm getting at?

A Yes.

Q In that situation, you would be called upon to assess a penalty for the offense of murder, not capital murder, but just regular murder and you can't receive the death penalty for regular murder. Now, so we're clear on [428] this and I want to be brief about this, but I need to cover this with you. When we talk about murder, we're talking about a situation where one person knowingly or intentionally or both, knowingly and intentionally, causes the death of another individual without any legal excuse and without any legal justification at all. So when you talk about murder, I want to divorce from your mind, if we can, a homicide, you see, where you have somebody who was acting in self-defense. In other words, when you talk about the range of punishment for murder, we're not talking about a range of penalty for a situation where you believe someone killed somebody else, but they did it in self-defense because, if you believe that someone acted in self-defense—for example, if I felt that Mr. Nelson was going to kill me or you felt that way about me, you have the right to protect yourself all the way to the point of using deadly force to kill me. See, you could be charged with murder or I could be charged with murder, but if the jury believed that I acted in self—defense, they would have to find me not guilty. Do you see what I'm getting at?

[429] A Yes.

Q It's not like you're giving a lower penalty. Huh-uh. You have to find the Defendant not guilty. Do you see what I'm getting at?

A Yes.

Q So when we're talking about murder, forget about someone that kills in self-defense. All right? The same thing holds true if you believe it was an accident. It may look like murder and somebody could be charged with murder, but if you believed honestly or had a reasonable doubt that it was an accident, the gun went off accidentally or something like that, you don't give them a low punishment. You find them not guilty. So don't be thinking about accidents, either, all right, or 'insanity. A lot of people are skeptical about insanity defenses these days for whatever reasons, but if you believed someone was insane at the time he killed somebody, you would have to find them not guilty, so don't be thinking about that. The same thing holds true if you believe it was a crime of passion. That's a situation—as an example, if someone comes [430] home and finds out that their child has been sexually molested by a neighbor and the neighbor is up the street laughing about it and you go into a rage basically, adequate cause, you take a gun and you kill the neighbor. The law doesn't excuse that, but it doesn't make it murder, either. If you were on a jury and you believed that the person killed with that kind of sudden passion, that sort of influence, you would not convict him of murder. You would convict him of voluntary manslaughter, so that's not murder. Do you see what I'm getting at?

A Yes.

Q The reason I'm making that point is, I want to make sure you understand as clear as I can present it what murder is. Now, the penalty range for murder is as broad as it is for any offense under the laws of this state. Okay. Let me ask you—I know you said earlier that you felt obviously strong about murder being, obviously, a very serious offense.

THE COURT: One moment, please. Is this a juror?

[431] MR. MACALUSO: Thank you, sir.

Q Mr. Fields, if you had the power, what do you think the minimum penalty ought to be for a murder as I've described it? In other words, I can't give you facts and situations like this type of murder or that type of murder, but excluding those things that we did discuss, excluding self-defense, excluding insanity, excluding accident, excluding any crime of passion or an emotional type thing.

A Are you saying that all of those you just named and described earlier—say types of violence that have a premeditated reason; is that what you're saying—

Q No.

A —and murder without a premeditated reason—

.Q No. What I'm saying is, if one person knowingly or intentionally kills another and there is no legal excuse or justification. Those four things I gave you are legal excuses or justification. You see?

A Okay.

Q In other words, a person knowingly [432] or intentionally kills another person and it wasn't in self—defense because that's not murder and it wasn't insanity and it wasn't an accident and it wasn't a crime of passion.

A Well, based on what I told you earlier, death would be the result.

Q All right. Now, that's your s that personal feeling correct?

A Yes.

Q Now, let me explain, but it's not to argue with you or quarrel with I'm not going to do that. The range of under the laws of Texas for the offense not less than five years nor more years or life, depending upon still bear in mind excluding those four things I described to you. I gather from what you—re saying—or just tell me in your own words, could you ever, would you ever, think, sir, that a five year

sentence would ever be proper under any facts and circumstances for the offense of murder where one person knowingly or intentionally causes the death of another person, no self—[433] defense, no accident, no insanity, no crime of passion?

A Now, you asked me could I—you want to know what do I thank the minimum penalty would be in a case of murder?

Q Right. What I actually want to know is, would you ever, knowing yourself, feel that five years would be enough, that the minimum punishment, five years—could you ever assess a penalty for five years in a murder case regardless of the facts or circumstances? As long as there is a murder, could you ever give as low as five years?

MR. CUNNINGHAM: And he felt that was the proper punishment based upon the law and the evidence that he had heard, Your Honor.

A Are you meaning personally or based on how the law sets this out?

Q Well, I guess a combination of both.

A Well, I was asking him, was he meaning how did I feel about it personally or how did I feel about it in regards to how the [434] law says it is.

Q Well, the law sets out—you see, we want to know how you feel.

A Well, it would be fine.

Q You say you could give five years?

A I'm saying I could give five years.

Q And if you felt it was proper, if the facts and circumstances called for ninetynine years or life?

A I could give that.

Q Let me ask you this, sir: Do you know of any reason why you couldn't sit in judgment of another human being in a case of this type?

A No, sir.

Q The law says that a conviction can be had—that is, the jury can base a conviction on the testimony of one eyewitness to a crime. That's what the law says. You can understand how frequently there may be only one eyewitness to a crime, a lady is raped or someone has had their purse taken from them, whatever the case may be. There may be one survivor to whatever offense it is. The law [435] says that, whether it be capital murder or shoplifting or rape or purse snatching, if the jury believes that one eyewitness beyond a reasonable doubt—in other words, they believe that person can recognize the individual and testify to all the elements of the indictment, the jury can base a conviction on that and nothing else. How do you personally feel about it? Could you base a conviction in a capital murder where the death penalty is a potential on the testimony of one eyewitness if you believed the eyewitness beyond a reasonable doubt?

A Yes.

Q I'm just going through the questionnaire here. You said your brother it says, "Have you, your spouse, or close friend or relative, ever been charged, arrested, indicted, or convicted of any criminal offense?" and you said something about your brother?

A Right.

Q Could you tell me a little bit about that?

A He was arrested and convicted on [436] number of occasions for possession of a controlled substance.

Q Was that here in Dallas?

A Yes.

Q Was he involved in any trials or anything like that?

A I suppose of sorts. I don't really know too much about it.

Q Was he ever convicted?

A Yeah, he served time.

Q Do you feel that that would in any way interfere with your service on this jury at all?

A No.

Q Mr. Fields, you've been very polite and very kind and very open with us and I appreciate that. Let me just ask you, sir, whether I touched on it or not, is there any reason that you know of why you could not—be fair and impartial to both sides?

A No.

Q Do you have any questions of me at all?

A No.

MR. MACALUSO: Thank you [437] very much. Your Honor, I'll pass the juror. Mr. Fields, Mr. Cunningham and Mr. West will have some questions for you.

THE COURT: Go ahead, Mr. Cunningham.

[438] EXAMINATION

BY MR. CUNNINGHAM:

Q Mr. Fields, as you have been advised, Mr. West and myself represent Thomas Joe Miller-El in this case where he is charged with the offense of capital murder. Very briefly I'd like to ask you some questions with reference to the questionnaire and possibly concerning some of the law.

First of all, what age man are you, sir?

A As of yesterday, I'm forty-seven.

Q Happy belated birthday. How long have you lived in Dallas County?

A About twenty-five years, twentyfour years. I came here in '62.

Q What is your race?

A I'm really colored.

Q Okay. Are you married, single or what is your marital status?

A I'm married and I have four children.

Q Does your wife work?

A No, she doesn't.

Q Where do you work?

[439] A I work for the U.S. Postal Service.

Q That's here in Dallas?

A Yes.

Q How long have you worked for the postal service?

A Eighteen years.

Q Do you have any children?

A Yes, four.

Q What do they do?

A They're all students from a senior in high school down to the third grade.

Q You attend St. Monica Catholic Church?

A Yes.

Q Is that an integrated church? A Yes.

Q What racial mixture would you say it was? You know, how many—

A Oh, I would say the majority there are white or caucasian and then the next majority would be Latin American or Mexican American and then your people from the far east or middle east Indian, Vietnamese.

Q In other words—your church is [440] located where, in North Dallas?

A It's at the corner of Walnut Hill Lane and Midway Road.

Q How long have you been a member of St. Monica Catholic Church?

A For ten years.

Q Do you teach Sunday school or hold an office or anything?

A Well, in the Catholic church you don't have Sunday school as it's set up in the protestant church. I'm a member of the Holy Name Society and that's a men's organization and it's basically devised or set up to assist the pastor as he needs and to promote the belief of Christ.

Q How long have you been a member of the Holy Name Society?

A For the last seven years. Now, in conjunction with that, as far as teaching goes, not within that parish, but at large within the Catholic church, there is what we call the charismatic renewal and I have taught there.

Q How long have you taught in the charismatic movement within the Catholic church?

[441] A Eleven years.

Q I notice that you attend this church more than once a week?

A Well, between the movement and the church, yes, and meetings, and we have holy days of obligation which requires you to attend more than once a week.

Q You've indicated that you are a member or a financial supporter of a media church. What church is that, sir?

A St. Monica.

Q St. Monica?

A Oh, I'm sorry, the media church. Yes, sir. The 700 Club on—which is—

Q How long—have you been a contributor to the 700 Club?

A About five years.

Q You indicated that you have heard something on the radio, I believe—was it the radio?

A Yes.

Q You understand that that is not evidence in this case?

A Right.

Q And you could not consider that as [442] evidence?

A Right.

Q Well, like I said, yes, I can do it, but it didn't go into any detail. It just said that this was coming up and it would probably take three weeks to seat jurors and that's where the thing ended.

Q You also understand that, if you heard something—if you were chosen as a member of this jury and you heard something on the radio or saw something on TV or read it in the papers, you could not consider that as any evidence whatsoever?

A Right.

Q How long have you had the bumper sticker on the back of your car?

A Eleven years.

Q And that bumper sticker says what?

A It says, "Jesus Renews the Hearts of Men"—or "Jesus Renews Hearts" in big letters and then "(the Hearts of Men) " in parentheses.

Q You indicated that you had received a ticket once and you felt that it [443] wasn't deserved?

A Right.

Q The fact that you received this ticket would not affect your decision if chosen as a juror in this case, sir?

A No.

Q You indicated that either a friend or—member of your immediate family or a closer friend was a victim of a crime. Is that "mugging"?

A Yes.

Q Was it someone in your family?

A No, a friend.

Q. Wash anyone ever caught or anything?

A It just recently happened, so no one has been caught.

Q The fact that you hae a friend that was mugged would not affect your decision, if you're chosen as as juror, in this case?

A No.

Q You would be fair to both sides?

A Yes.

Q Mr. Macaluso asked you about your brother. Whatever happened to your brother, [444] that would not affect your decision, if chosen as a juror, in this case, sir?

A No.

Q If you were chosen as a juror in this case, would you base your decisions only upon the evidence that you heard and the facts of that case, sir?

A Yes.

Q Let the chips fall where they may?

A Yes.

Q Do you know of any other reason why you could not be a fair and impartial juror, sir?

A No.

Q I'm going to add one word onto that. Do you know of any other reason why you could not be a fair and impartial juror other than your race, negro or color black?

A No.

MR. CUNNINGHAM: Pass the juror, Your Honor.

MR. NELSON: Judge, may we approach the bench?

THE COURT: Surely. Mr. Fields, let me ask you to go out [445] in the hallway while we have a law matter to take up here and, in that way, we can just do it without the lawyers having to come around.

(Whereupon, Mr. Fields left the courtroom, after which the following proceedings were held.)

MR. NELSON: We have an indication, Judge, that this juror has what they denominate as an annual leave coming up in the next couple of weeks and we thought that was a situation that the Court ought to check into before a decision is made as to the qualification of this juror.

THE COURT: Well, I can go into—go ahead, Mr. Cunningham.

MR. CUNNINGHAM: Your Honor, we would object. Mr. Macaluso talked with this prospective juror thirty minutes or more. I think one of his questions was whether [446] or not there was any reason why he could not be a fair and impartial

juror. I asked him the same thing. If he thought that his coming vacation would affect his sitting as a juror, the State could have inquired. If he had thought—and I would suggest from the answers we have received from Mr. Fields—it would affect his decision as a juror, he would have told us.

THE COURT: The only concern the Court has is, if he is accepted—I don't know what is' going to happen, obviously. I would need to ask him, frankly, before I swore him, if there was any reason why he couldn't come back and serve in a month, say. I have had that happen.

MR. MACALUSO: I might add, Your Honor, that I have had this occur a number of times and I think we all have. I'm not trying [447] to play word games here, but I did overlook asking that question and I.think the question, as Mr. Cunningham mentioned a moment ago, did address it, was there any reason why you couldn't be fair and impartial and not whether there is anything that would impede your service on this jury. I have had in the past and I know the Court is aware of situations that have occurred where we neglected to ask that question only to have it come up later on.

THE COURT: Well, Mr. Cunningham and Mr. West, how about the Court inquiring of him just in that area? I don't know where this information comes from.

MR. CUNNINGHAM: Your Honor, on behalf of the accused, Thomas Joe Miller-El, Jr., I would object to even the State, the defense, or the Court inquiring of the juror whether or not the fact that he [448] has a vacation coming up in one week, two weeks—and it looks like it's getting even longer in this case—and would suggest that under Article 35.11 that all the State can do now is decide whether or not it wants to accept or reject this juror.

THE COURT: Mr. Nelson, Mr. Macaluso, I agree with the defense on that. I probably would still like to inquire if he is accepted.

MR. CUNNINGHAM: And then he would have to make other arrangements. It's just that simple.

THE COURT: That would be my position, unfortunately. I'm going to hold the juror qualified at this point, Mr. Macaluso and Mr. Nelson, and ask you—all to tell me whether you wish to accept or swear the juror?

MR. MACALUSO: We'll exercise—reluctantly exercise [449] a preemptory challenge, Your Honor. I want to ask the Court, does the Court intend to make an inquiry?

THE COURT: Of him, or just in the future of all jurors?

MR. MACALUSO: Of him.

THE COURT: If you wish, I will, yes, just for information purposes.

MR. MACALUSO: I understand. I can envision a situation, because I've seen it before, where it comes back to haunt us somewhere down the line.

THE COURT: I had that happen in the last case you and I did and we spent about three hours on the juror and found out in the last five minutes that he had some—I think in the future what I will do, when I'm doing my little preamble there, is just tell the person—remind them again what the potential schedule of this case is and ask them if [450] there is any reason they would be unable to do that. If they indicate there would be, I'll let the lawyers start pursuing it.

MR. WEST: Before we bring the juror back in, may the record reflect that is the second black that's been called by the Court for voir dire purposes.

THE COURT: The record may so reflect. I might add—go ahead, Mr. Nelson.

MR. NELSON: Your Honor, with reference to that, the State would like to offer into the record the fact that we're certainly not exercising a preemptory strike on Mr. Fields

because of his race in this case, but we do have concern with reference to some of his statements as to the death penalty in that he said that he could only give death if he thought a person could not be rehabilitated and he [451] later made the comment tnat any person could be rehabilitated if they find God or are introduced to God and the fact that we have a concern that his religious feelings may affect his jury service in this case. Those are our reasons for exercising our preemptory strike at this time.

MR. CUNNINGHAM: Your Honor, we would object—we would say, the defense would say, that the reason just given by the State for their exercise of their second preemptory challenge is a farce and that this juror was explicit both on his questionnaire and in answer to Mr. Macaluso about in the proper case and under the proper facts and circumstances that he could and would give the death penalty. He also expressed the fact that he was a deeply religious man and that is shown by his questionnaire and by the [452] information I elucidated from him and that there is nothing wrong with the fact of a person believing that every individual can be rehabilitated and that in no way conflicts with his belief that in the proper case and under the proper facts and circumstances, he could render a verdict answering the three questions, that are required by 37.071, yes if the evidence showed that and, Your Honor, there is no conflict and there was no conflict and the State had an opportunity to go into as much detail as it wanted to develop whether or not there was a conflict and, after all the examination by the State, there was no conflict shown.

Your Honor, for the purposes of the record, we would also—we want to offer the questionnaire that was filled out by Mr. Fields as an exhibit in this case, both [453] the one that the State had and the one that the defense has.

THE COURT: Well, the Court has one, too. I'll admit it—I'll give the State a chance to object to it. I'm sorry. I'm being a little presumptuous.

MR. NELSON: Excuse me, Judge. It's just for record purposes?

THE COURT: Right. I'm assuming it's just for record purposes?

MR. CUNNINGHAM: Yes.

THE COURT: I would offer to either side—I was going to say, if you—all wanted to, for appellate purposes, let the record reflect some of his answers on the questionnaire having to do with whatever, the number of children, that you could offer the questionnaire because it was given under oath. The juror was sworn prior to the time he filled this

* * * *

[455] Fields' questionnaires?

THE COURT: Yes.

MR. MACALUSO: The Court is going to admit, for record purposes, Mr. Bozeman and Mr. Fields?

MR. WEST: And Mr. Fields.

MR. MACALUSO: I have no objection to that.

MR. WEST: Excuse me, Mr. Nelson—

THE COURT: Go ahead, Mr. Nelson.

MR. NELSON: I just wanted to make sure the record is clear that I said we would like to call attention to the fact that his brother has been convicted of a felony prior to this, also, which is another consideration to the State's decision.

MR. CUNNINGHAM: Your Honor, there is no evidence that he was convicted of a felony.

MR. NELSON: All right. He [456] says he's been convicted of an offense and did time. The record will speak for itself on that, also.

MR. CUNNINGHAM: I think that, if he had been convicted of a felony, then he would have been disqualified—

MR. NELSON: His brother. His brother.

MR. CUNNINGHAM: I'm talking about his brother. That's the one you said was convicted of a felony?

MR. NELSON: Right.

MR. CUNNINGHAM: If he was convicted of a felony of possession of a controlled substance, then he would not be qualified and he never would have gotten up here and have been on this jury.

MR. NELSON: His brother.

MR. CUNNINGHAM: I'm talking about his brother.

[457] MR. NELSON: The fact that his brother was convicted doesn't disqualify him, as a matter of law, Brice.

MR. CUNNINGHAM: Oh, okay. Excuse me.

THE COURT: Let's bring Mr. Fields back in.

(Whereupon, Mr. Fields returned to the courtroom and the following proceedings were held.)

THE COURT: Mr. Fields, just come back up here in front of the bench, sir, if you would. Sir, you've been excused from any service in this case and I want to tell you that we appreciate your attendance and your patience with us and your very candid answers to the questions. When you're excused, you can give your badge to the bailiff. A question came up in my mind, because of your job, that you might have some [458] vacation coming. Would that have interfered with your service in this case?

MR. FIELDS: I'm on vacation this week.

THE COURT: You're on vacation right now?

MR. FIELDS: We have jury duty time.

THE COURT: So you get credit. You don't get docked?

MR. FIELDS: No.

THE COURT: You don't get docked for serving on a jury and you still get your vacation?

MR. FIELDS: Right.

THE COURT: Off the record.

(Whereupon, there was an off-the-record discussion, after which the following proceedings were held.)

THE COURT: This is number ten. Mr. Riddle, first of all, I apologize to you for the delay. We've got people scheduled here

* * * *

[1519] JOE A. WARREN, called as a Jurv, panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth and nothing but the truth, was examined and testified as follows.

EXAMINATION

BY MR. MACALUSO:

Q Thank you, Your Honor; and good afternoon, Mr. Warren. Mr. Warren, let me begin by reintroducing everyone to you. I'm Paul ETacaluso. This is Jim Nelson.

MR. NELSON: Good afternoon.

Q When the trial begins, we will be joined by MOrman Kinne. Mr. Kinne, along with the rest of us here, are assistant criminal district attorneys here is Dallas. We work for Henry Wade who, I'm sure you know, is the district attorney for

Dallas and Mr. Wade has designated us to represent the State of Texas. Mr. Kinne, to our surprise, contracte the Chicken Pox. He's about fifty years old, so we're kind of ribbing him about it. I guess it's not really funny that he came down with it because he's got Chicken Pox and we'll porbably join him in the next couple of weeks.

[1520] To Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAH: How are you, Mr. Warren?

MR. WARREN: Fine, sir.

Q To Mr. Cunningham's immediate left is Mr. Royce West.

MR. WEST: Mr. Warren, good. afternoon.

Q You may recall that they are the defense attorneys who have been appointed by His Honor; judge McDowell to represent the Defendant who is charged with capital murder. His name is Thomas Joe Miller-El. He's in the powder blue suit and you may be able to see him form where you're sitting. He's charged with capital murder.

The reason I've taken time to, reintroduce everyone—here is to reacquaint you with the roles we play; who we are and what we do, and simply to ask you if you recognize any one of us, Mr. Warren, other than from the other day?

A No. I've probably seen each of you.
Q Gooing down the halls of something like that?
A Yes.
Q You don't know anything about this case, do you?
A Not that I can recall.
Q As you well know, Mr. Warren, are a prospective i uror in this case We have two jurors, but one is kind of iffy because they may have a medical problem. Basically we have two Jurors, but we need ten more before we can start. We've

talked to—you're the twenty-eighth person that has been assigned to service in this case and we only have twojurors; so you can see how laborious and time-consuming this is.

Now, the whole purpose of this process we're going through is to ultimately try to find the twelve people that both sides feel are best suited and best qualified for this type of very serious case. You know the Defendant is charged with capital murder. That's the most serious level of all crimes under the laws of this state it's obviously serious because of the nature of the offense.

* * * *

[1527] he went ahead and killed anyway is that right?
A Yes.
Q I gather you feel very strongly about human life, I gather, in that regard?
A Sure.
Q We're talking abou't murder?
A Yes.
Q What sort of crimes, if you can think of any—and if you can't, that's fine, but just let me know. What sort of crimes do you feel it would not be warranted? You said some cases yes and some cases no. Are you saying, if he didn't have a choice, you don't think the death penalty is warranted?
A I would say in some cases; if you were—in self-defense sometimes, then I would say no.
Q Let me talk a little bit about murder and capital murder. First off, you can only receiver the death penalty in Texas for the offense of capital murder. It's a very, very special type of murder. Years ago you could get the death penalty for rape and you could get the death penalty for armed robbert and some other offenses, I think. But under the [1528] law that is in effect in Texas today, the only offense that can receive or potentially receive the death penalty for is a capital murder.

Capital murder starts off basically with what we know as the offense of murder. I'll call it regular murder even though the law doesn't agree with that. It just calls it murder. Murder is a situation where one person knowingly or intentionally causes the death of another individual without any legal excuse or any legal justification. Murder, as I've describe it is not a capital offense. It is not an offense for which a person, under the law of Texas, can receive the death penalty.

For example, if I knowingly and intentionally cause the death of Mr. Nelson without any legal excuse or justification, that may be murder. Unless it's committed under certain circumstances or Mr. Nelson is a particular class of individual like a fireman or a police officer, then all it is—I shouldn't say all it is because it's obviously very serious. It is not capital murder. Am I making myself clear?

[1529] A Yes

Q All right. You can't receive the death penalty for that type of a murder. On the other hand, if you commit murder, knowingly or intentionally causing the death of somebody, and you murder somebody who is a policeman or a fireman or jail guard, and those people are acting in the lawful discharge of their duties—their on the job, I other words—and they're killed, then murder is elevated, raised up to the level of capital murder and you can receive potentially the death penalty for that. Do you see what I'm getting at?

A Yes.

Q Some other types of capital murder would be murder of a bunch of people, man murders. That's new under the law. Do you remember when there were six or seven people in killed in a bar about two years ago?

A Yes.

Q That could be capital murder under the law. Or if you kill somebody for hire, if I hired Mr. Nelson to kill Mr. Cunningham, I could be tried for capital murder for hiring

him and he could be tried for doing [1530] the actual killing. Both of us could get the death penalty for hiring yourself out as a killer. Or, as we've alleged here in the indictment, if you commit murder while you're either attempting to commit or are actually committing another felony offense. If you murder while you're robbing them, if you murder somebody while you're burglarizing somebody's home, if you murder somebody by arson or you kidnap somebody that you murder. Do you see what I'm getting at?

A Yes, sir.

Q We call that murder plus. Right off it's a murder plus another very serious felony offense. How do you feel about this? Do you fell those are the types of cases, generally speaking, where you feel the death penalty would be appropriate, depending on the facts and circumstances?

A Well, there again, I would say it depends on the case and the circumstances involved at the time.

Q Okay. But depending upon those things that you mentioned earlier, do you feel, for example, a murder during a robbery where a [1531] person had a choice to kill or not to kill? Do you see? Do you fell that would be the type of case that you feel the death penalty would be warranted in?

A I think if you had a choice, you know.

Q Now, let me ask you: Have you ever felt differently about the death penalty at all? Have you ever felt it wasn't the thing to do or it wasn't—we didn't need it or we shouldn't have it?

A Well, there again, it goes back to the situation, you know, sometimes.

Q You know, some people have just a general disapproval of the death penalty. I know some people go down to Austin to lobby against it and have it repealed. You never were like that, I guess?

A No, I've never—you know, just as far as generally speaking, I've never.

Q You fell it's proper on a case-by-case basis; is that right?

A That's the way I look at it, depending on the individual case.

Q Let me ask you: Do you see it [1532] serving a particular purpose in our society? Do you thing it accomplishes anything in particular?

A Yes and no. Sometimes I think it does and sometimes I think it don't. Sometimes you have mixed feelings about things like that.

Q What do you think it accomplishes when you feel it does?

A I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment of, you know, you're relieving personal punishment.

Q In other words, you feel under certain circumstances the death penalty would be bad, but being locked up in a cage would be a whole lot worse and be more punishment; is that what you're saying?

A Yes. In some cases you feel like maybe if the person were to suffer in some other way maybe. Maybe I'm not being specific, [1533] but sometimes, you know, you feel maybe this is not really punishing the person to give him the death penalty.

Q It's over?

A Yes, it's over and, you know, they're not really suffering from it.

Q Let me ask you this: You're a married man, aren't you?

A Yes, sir.

Q Do you know or would you hazard a guess how your wife feels about the death penalty?

A No, I don't because we've never really discussed it.

Q It's not something that everyone sits down and hashes out, but sometimes people know or have feelings. If you had to hazard a guess, if you guessed, what do you thing her feelings would be?

A Well, it I had to guess, I would say probably it would depend on the situation.

Q You've got three children; is that right, sir?

A Yes, I have.

Q On of them is grown, though. [1534] Almost all of them are grown, aren't they?

A I have one still in high school.

Q Let's talk a little bit about the procedure in a capital murder case. You understand that under the old laws when a capital murder case was tried, the jury decided in the first part, of course, as they do today, whether the person is guilty or not guilty based on the evidence. If the State proves the indictment to the jury and the jurors has taken an oath to a true verdict render according to the law a according to the evidence, it would mean simply this: If they proved the case to you that the man is guilty, you find him guilty. Can you do that?

A Yes.

Q And if we didn't prove it to you, obviously, if you had a reasonable doubt about one of the accusation, you would find him guilty. Could you do that as well?

A Yes.

Q Just call it the way you see it. That's all that would be expected. How, in the second part of the trial under the old law, the jury hear more evidence and they might [1535] not. They might must learn about what happened in the offense itself. Under the old law, after you heard all of the evidence, the jurors would decided directly whether a person should receive the death penalty of a life sentence of some number of years. If you someone ought to die or for what you heard and the others agreed to it, that's what he got, or the others agreed

to it, that's what he got, or life or whatever it was, if the jury unanimously agreed. Could you do that, it you were called upon to do that? Could you make that decision?

A I think I could.

Q Okay. Now, that's kind of a trick question because the law doesn't allow you to decide directly whether someone should die of get a life sentence or a number of years. In fact, you can't even consider a number of years. Instead, the give you at the end of the trial—after you've heard all of the evidence, the Judge will give you two or three questions to answer based on the evidence and the State has the burden of proof that the questions should be answered yes. If they proved they should be answered yes, you answer [1536] them yes. Just like you would have to find the man guilty in the first part, you answer the questions yes if we prove that they should be answered to you in the second part. Any problem with at all?

A No.

Q If we don't then you, as a juror, are required to answer the question no, could you do that as well?

A Yes.

Q Do you understand the effect? All yes answers, that's the same as if you had written in death because the Judge—if you write yes, yes, yes, the Judge will automatically, under the law, assess a sentence of death to the Defendant. He can't say, "No, I don't agree with that. I'll give him a life sentence." You see, it's automatic. You're not writing death, but three year answers equal death. Make no mistake about it. Could you do that?

A Yes, I could.

Q All right, The same thing, one or more no answers equals a life sentence. Whether Judge agrees with you or disagrees [1537] with you, you'll never know anyway because he's not going to say that, what his feelings are.

With all due respect to the Court, he's not in the position to tell you whether he agrees or disagrees. Now, you said you could that, as well?

A Yes.

Q All right. Let's look at the three questions. Take whatever time you need to read those, Mr. Warren, and we'll talk to you about them in a little bit more detail.

A (Juror complies.)

Q Any questions about those at all?

A No.

Q The first one, I think, is pretty much self-explanatory. It asks you whether the Defendant acted deliberately with the reasonable expectation that the victim would die. You say you could answer that question yes or no once you hear the facts of the case?

A Yes.

Q If you hear facts that convince you he acted deliberately, if you hear facts that convince you that he acted with reasonable expectation that someone would die, [1538] you answer the question yes. If you don't you answer the question no. Any problem with that?

A No.

Q How about number two? What do you think is being asked there, Mr. Warren?

A In my opinion, I'm being asked would this person be a threat to society later.

Q The key word there is probability. What do you think that words means to you in that context.

A Maybe a chance or something like this.

Q Is there a chance that the Defendant would commit—it doesn't say a particular offence, does it?

A No.

Q It doesn't say another murder, another capital murder, rape robbery, burglary or an assault. It says criminal acts of violence. That may be self-defining. It may mean what it says it means, an act of violence. Is there a chance he will

commit an act of violence, a crime, in the future? Do up necessarily agree with that?

A I suppose there's always that [1539] chance, but there again, you never know.

Q Well, do you think that question can be answered yes or no? Would you be able to answer that question yes or no depending upon the evidence you hear?

A Based on the evidence, I would answer it accordingly.

Q Let me ask you this, Mr. Warren: Could you share with us what you feel would be the most valuable to you to permit you to answer that question yes? What would you want to know about somebody to decide whether or not this is the type of person, you know, that you would feel good about answering the question yes, "Yeah, I think there is a chance that his guy is going to commit some criminal act of violence in the future."? What would you want to know about?

A What would I want to know?

Q Yes. I'm putting you on the spot, aren't I?

A That's really hard to say, as far as being specific, What I would like to know. I guess probably I would have to know some of the background of the person, maybe something [1540] that happened in the past or something like this.

Q Criminal background, had he done something like this before?

A Something like this in the past, you know.

Q That he's done some other violent acts in the past?

A Yes.

Q Let me ask you: Do you think you could learn enough when you learn about what he did during the offense itself? For example, you learn about the crime itself, the capital murder itself, what he did, for example, before, during and after, like did he plan it, did he participate in the planning, pick out the victim, the location. How about the crime itself, did he actively participate in it or was he the get-away driver? Do you see? Was he a leader or was he a follower? Was he

calling the shots or just standing by? Did he have—like you said earlier, did have to do what he did? Was it necessary that he kill this individual? Do you see what I'm getting at?

[1541] A Yes.

Q Okay. Then afterwards, you decide whether or not—how did he react to the whole thing? After killing this individual, if he did, was he feeling bad about it , crying, unhappy about it, or was he nonchalant, was he blaze, another day at the office, he just didn't care. If you learn all about the offense itself do you think you could learn enough about a person if you learn all about what he did before, during and after a crime, would it satisfy you that, "Yeah, there's a chance that this guy will probably do something like this again given the chance"? Do you think you could do that?

A Sure, there's a possibility.

Q The last question just asks basically whether or not it was an offense that involves some provocation. In other words, did the victim do or say something to provoke the Defendant into killing him. If you decide that he didn't do anything, then you answer the question yes, it was an unprovoked death. If you decide he did or said something, then you decide whether or not the Defendant acted [1542] reasonably or unreasonably in killing him. Do you see what I'm getting at?

A Yes.

Q Let's shift gears for just a second, Mr. Warren, and talk about what we started talking about initially and that's the offense of murder. Let me make sure you understand what murder is and what a murder is not, okay?

A Yes.

Q Because you mentioned something earlier about self—defense. Let me talk to you about the offense of murder. Let me set the ground work. You could be on a capital murder jury. Just imagine for it for a second. We're not talking about this case or anything like that, just another case, imaginary case. Let's say it was a murder during a

burglary. Let's suppose for just a minute that you hear evidence that satisfies you and convinces you beyond a doubt that the Defendant murdered this individual, but let's say you didn't hear any evidence about a burglary. Do you see? If we want to convict the Defendant of capital murder, we have to prove both the murder and [1543] the burglary. Do you see what I'm getting at? We didn't do that, though, did we? We only proved the murder, so you can't find the Defendant guilty of capital murder if we didn't prove the burglary. You found him not guilty of capital murder and found him guilty of murder, which is what we did prove. Am I making myself clear?

A Are you saying , if you proved the murder and not the burglary, it's not capital murder?

Q That's exactly what I'm saying. In order for that to happen—let's say that happened. Then the only thing about automatic life or automatic death—remember, as I said earlier, you can't get the death penalty or an automatic lift sentence just for murder, Do you understand that?

A Yes.

Q Okay. I gather you feel pretty strongly about murder, do you not? I mean, goes with out saying?

A Well, it's just like I said, you know. There are cases, I mean, personally, that I feel I wouldn't want to personally be, [1544] you know, involved with it if I had a choice, but as far as the case, you know, if I feel that you can avoid it, you know, I think you should.

Q All right. So let's talk—you said earlier that one of the biggest factors in your decision would be whether or not a person, like you said, had to do it or had another choice: is that correct?

A Yes.

Q Okay. Now, when we talk about murder, we talk about a situation where on person knowingly and/or intentionally causes the death or another human being without any legal excuse or any legal justification. Let's talk about

what a legal excuse or legal justification is. On of them was mentioned earlier. It's self—defense. You, me, Mr. Nelson and everyone here has the right to kill somebody, if it's necessary, in self-defense. If we don that, even though we might be charged with murder—if you were charged with murder and I was on the jury and I believed that you acted in self-defense, I would have to find you not guilty. It's not that I would give you a [1545] low punishment, but if I understood and believed that you acted in self-defense, I would have to find you not guilty. You would have to find me not guilty, if things were switched around. Do you see what I'm getting at?

A Yes.

Q So when you're thinking about the punishment for murder, the range of punishment for murder under the law—and we'll talk about that in a second—don't be thinking about self-defense because if you think somebody killed in self—defense, then you have to find them not guilty. They're not guilty of murder, so don't by thinking about self-defense.

Another justification would be, or another situation is, if you kill somebody accidentally. Even though you've been charged with murder, if I believe that you killed somebody accidentally, the gun went off by accident, the gun or a knife, whatever the case may be, I would have to find you not guilty. It's not like you say, "Let's give him some light punishment or give him probation or [1546] something like that." It's not guilty because that's not murder. If you believe that I was insane, even though you might not like the insanity defense because a lot of people don't, if you honestly believe that I was insane when I dilled somebody, it's not murder, Do you see what I'm getting at?

A Yes.

Q The same thing holds true, let's say, for a crime of passion, something that we all can understand. For example, you're a parent and let say, God forbid, something should

happen to one of our daughters. She's sexually molested, for example. You come home and you find out that the neighbor up the street is the one who did it and he's laughing about it and you go berserk, you know. You pick up a gun or a knife and you go up the street and you kill him. Do you see? That's not murder, either. If you believe that I did that, for example, because of what reaction I had to what this guy had done to my daughter, that's not murder. That's voluntary manslaughter. Do you see what I'm getting at?

A Yes.

[1547] Q It's not murder. I want you to divorce your thinking from accident, insanity, self-defense or a crime of passion or even a reckless act where I shouldn't have bee doing something because murder is a knowing and intentional act. I knew, when I killed Mr. Nelson, what I was doing and I intended to do it. Do you see what I'm getting at?

A Yes.

Q Now, the reason I mention that is this: The law—as I said, there is a completely different range of penalties for the offense of murder. I don't want to be thinking about these other things where you might say that you would give a guy a break if it happened—if I though he was insane or if I thought it happened in self-defense, any of those cases. You don't do that. You find them not guilty. What we're talking about, we're talking about murder, "I knew it." I intended to dot it." "I killed somebody." There is no legal excuse of justification.

Let me ask you: What do you personally feel ought to be the penalty? What do you think ought to be the minimum penalty [1548] for someone who knowingly and intends to kill somebody? What do you personally feel should be the minimum penalty for that sort of conduct?

A Are you speaking without any provocation or anything, just—

Q Right.

MR. CUNNINGHAM: You Honor, we would object to without any provocation because provocation is not an element of the offense of murder.

MR. MACALUSO: I'll rephrase it, Your Honor.

THE COURT: Go ahead.

Q When we say provocation, we mean something where I would be acting in self-defense if he provoked me. I'm talking about limiting it, so don't be thinking self-defense, insanity, accident or a crime of passion, in the heat of passion. What do you think the minimum ought to be.

A Well, if I have to just give you a flat answer without knowing the case itself—

Q Well I cannot give you a fact [1549] situation and I'm not asking you what would you do if this happened and what would you do if this happened, what would you do if that happened. Lt me ask you this: The range of penalty for murder is from five years in the Texas Department of Corrections all the way to ninety-nine years or life an up to a $10,000.00 fine. The law simple says, to be a qualified juror, if you can in all honesty, you have to set the punishment somewhere within there. If not, like you said earlier—in all honesty, if you cannot, if you don't think you could set a punishment within that range, then you need to let us know. In other words, if you saw a case that involved a murder—and I don't have time to go back and review those categories, but a murder where one person knows he's going to kill this individual and kills him—what do you feel would ever be proper , under any facts and circumstances, to your way of thinking, to ever assess a penalty as low as five years in the penitentiary for knowing and intentional killing?

MR. CUNNINGHAM: If he [1550] thought that was the proper punishment

MR. MACALUSO: Excuse me, Judge.

MR. CUNNINGHAM: Your Honor, if he felt that that was a proper punishment in that case.

THE COURT: Did you qualify it like that?

MR. MACALUSO: I believe I did. I think I said what he thought was proper based on the facts.

Q In other words, could you ever vote for five years?
A I would try to make my decision based on the case and the evidence at the time?
Q Are you saying that you could?
A I could, based in the evidence that was given at the time, yeah.

Q All right. By the same token, I gather then, if you heard fact and circumstances that called for a sentence of ninety-nine years, if you felt that was the proper thing to do after you heard the [1551] evidence, you could do that?
A Yes, if—I would make my decision after I heard the evidence. I wouldn't make the decision in advance.
Q Let me ask you this, sir, in closing here: If you had the choice of having the death penalty in Texas or not having the death penalty in Texas, how would you feel? Would you have one or not have one?
A Well, you mean just a flat yes or no on the death penalty?
Q Yes.
A Well, I probably wouldn't vote yes or no because there are cases where I don believe it probably would be proper, but there are other cases where I don't, so—
Q What I'm saying is, if you could tailor certain fact situations, do you feet that we should have the death penalty for certain type of cases?
A In certain types of cases, I do.
Q Mr. Warren, I've done most of the talking here a given you time to respond, but let me ask you: Do you have any questions of us, at all?

[1552] A Not at this time.
Q Do you know of any reason, sir, whether I've touched on it or not, why you couldn't be a fain and impartial juror to both sides?
A None whatsoever.
Q Is there any reason why you couldn't answer all three of those questions yes, id we proved that they should be answered yes, knowing that it would result in this man's execution?
A No.
Q I appreciate your honesty, Mr. Warren, with us. Mr. Cunningham and Mr. West will have some questions for you now.

MR. MACALUSO: I'll pass the witness—juror, rather.

THE COURT: Thank you. Mr. Cunningham.

[1553] EXAMINATION

BY MR. CUNNINGHAM:

Q Mr. Warren, as you have been advised, my name is Brice Cunningham and, along with Mr. West to my left, we represent Mr. Thomas Joe Miller—El in this case where he stands charged with the offense of capital murder. Very briefly, I would like to ask you some questions concerning the questionnaire and possible some questions that may have been propounded to you by Mr. Macaluso.

This first question may sound like it is asinine or a question that is obvious on the face, but there are some things that we have to get at indirectly. What is your race?

A Black.
Q I notice that you live at 4123 Telstar?
A Yes.
Q How long have you live there, sir?
A I've been there about eleven years now.
Q Are you buying your home or renting your home?

[1554] A Buying.
Q You work at Kroger's as a market manager?
A Yes.
Q How long have you been with the Kroger stores?
A About twenty—one years.
Q How long have you been market manager?
A About nineteen and a half.
Q Does your wife work outside of the home?
A Yes, she does.
Q In what capacity?
A She's an operator. She operates a bagging machine.
Q How long has she been employed?
A About twenty years.
Q You're a member of Salem Baptist Church?
A Yes.
Q How long have you been a member of Salem Baptist Church?
A About twenty years.
Q Your two sons, are they in high [1555] school?
A One of them is, the youngest.
Q Where is the oldest?
A My oldest, he's at home, but he goes to a college here in town and works at night.
Q Which one?
A Mountainview.
Q What year is he in at Mountainview?
A He's in his second semester.
Q How long were you in the army?
A About three months.
Q You're a member of Local 540 Union, meatcutters' union?
A Yes, I am.
Q Have you held any offices in the union?
A No.
Q Is your brother still on the police force in New Jersey?
A No, he's not.

Q How long was he on the police force in New Jersey?
A I'm not sure. He was up there, [1556] after he got out of the service, for about twelve years. I don't now exactly how long he was on the force.
Q This mishap that you son was involved in, was that Bengy or Joe, Jr.
A That was Joe, Jr.
Q Did anything happen as a result of that that might affect your decision if chosen as a juror in this case, sir?
A No.
Q That was something at school?
A Yes, it was.
Q You indicate that sometimes you see certain cases on TV and you're interested in it. You understand that anything you may have seen on TV would have no bearing whatsoever on any issues in this case?
A Yes, I do.
Q And you could put that out of your mind?
A Yes, I could.
Q Was your brother-in-law a victim of a crime in Las Vegas?
A My brother, Yes.
Q Okay. What type of crime was it?
[1557] A I don't know the details of it, sir. He had to make restitution of some money. It involved some food stamps or something, but I don't know all the details of it. He was convicted and got a probated sentence. He had to make restitution of some money.
Q How long ago was that, sir?
A That was about a year and a half or two ago.
Q How long have you been a member of Crime Stoppers?
A Well, the reason is, we have it in the neighborhood, you know where we have is it called Crime Stoppers or Crime Watchers where, you know, you watch neighbors' homes? That may be Crime Watch, cut it's the neighborhood

service thing where the neighbors watch each other's homes. That's what I'm speaking of. When Chief Dyson was here, we were also involved in the other program that he had that was similar to that. I can't recall the specific name of it, though. It was similar to that . They would have little meetings in the schools and PTAs and stuff like that. It was king of a neighborhood thing is [1558] what it was.

Q What part of the city if Telstar located in?

A It's in Oak cliff off of Westmoreland.

Q Do you now of any reason, Mr. Warren, why you could no be a fair and impartial juror if chosen in this case?

A None whatsoever.

MR. CUNNINGHAM: Pass the juror, Your Honor.

MR. MACALUSO: May we have just a moment, Your Honor?

THE COURT: Surely. Mr. Warren, let me ask you to wait out in the had for just a moment, please.

(Whereupon, Mr. Warren left the courtroom, after which the following proceedings were held.)

MR. MACALUSO: We will exercise a preemptory challenge.

THE COURT: Okay. Well, I'll—

[1559] MR. WEST: I didn't hear you. Excuse me, what was that, Judge?

MR. MACALUSO: I said we will exercise a preemptory challenge.

THE COURT: Of course, I'll note that.

(Whereupon , Mr. Warren returned to the courtroom and the following proceedings were held.)

THE COURT: Mr. Warren, I'm going to excuse you form service in this case, which means you will be free to leave

here and go about your business. I want to add to what I said earlier and thank you for your patience primarily with us and the system. You were down here Monday practically all day and you're sown here late this afternoon. I note from some of these lawyers questions that they felt a great deal of respect for [1560] you, because I do, for your answers. You're the kind of juror to me, at least, that makes the whole system work. It's people like yourself who are willing to put up with the hassle of the system to do your duties a citizen. I wish you could serve as a juror one some cases, but evidently this is not the case. So you will be excused to go about your business. Thanks a whole lot.

MR. MACALUSO: Thank you, Mr. Warren.

MR. CUNNIGHAM: Thank you.

THE COURT: That takes care of twenty-eight.

MR. MACALUSO: Twenty-nine.

MR. NELSON: Thirty.

MR. MACALUSO: Thirty-one and Thirty-two.

(Whereupon, these proceeding are continued in Volume IV.)

* * * *

[1796] EDWIN L. RAND, called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Mr. Rand, I'm sorry. We're having a little trouble getting organized this afternoon it seems to get going. I'm sorry to make you sit up there or a minute. I want to kind of reintroduce everybody. You heard us in front of the whole group earlier this morning. To begin, my name is Jim

Nelson. Sitting next to me is Mr. Paul Macaluso. The third person that will be involved for the State of Texas is a gentleman by the name of Norman Kinne. Mr. Kinne is about fifty years old and is home with the Chicken Pox and has been for a couple of weeks, Having had them as a child, I can sympathize with him. I certainly wouldn't want to have them at fifty years old, but that's what he's dealing with. The three of us are assistant district attorneys and it will be our responsibility to [1797] handle this case for the State of Texas, We've been assigned to handle it by Henry Wade, your elected district attorney. Immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Rand?

Q And to his left is Mr. Royce West.

MR. WEST: Mr. Rand, good afternoon.

Q These two gentlemen have been appointed by Judge McDowell to defend Thomas Joe Miler-El. He's the man at the far end of the counsel table from me. You may be able to see him or you may not from your position there. Mr. Miller-El is charged with the offense of capital murder. That is the most serious offense in the State of Texas. Because of that—have you been on jury service before, Mr. Rand?

A No, I haven't.

Q Normally in jury service, you would be seated out in the gallery with the entire group, kind of like you were this morning, and question would be asked and some things would be discussed out there in front of [1798] the entire group rather than one on one or one on five like we're doing it here. The hope is that because these issues are so serious an people have very strong feelings one way or the other on what's involved in this case, by you being in here individually, you will be able to feel that you can talk more openly and hopefully be a little bit more relaxed, at least as you can be while you're up on the witness stand and we're

out here. The big thing that we would like you to do is relax and remember, Mr. Rand, that here are no right or wrong answers to anything any of us are going to ask you today. We're just trying to find out how you feel. No one is going to argue with you or try to change your mind about anything, but we feel like you need to know what you're dealing with and what's going to happen and, of course, we need to know how you feel about some things, so we can get the twelve people best suited to serve in this jury sitting in those twelve chairs over there.

Now, we've talked to—you're the thirty-seventh person we've talked to in this trial and we have two jurors at this point, so [1799] you can see it's a rather tedious process and things take a while. Not everyone is suited to serve on this particular kind on case. With that rather lengthy introduction, that's why we're talking to you individually and, if you will just be as open and honest as you can be with all of us, Mr. Cunningham, Mr. West and the Judge, who will be listening at the same time I'm talking to you, if you will be as candid as you can be, then that will help us what we need to do an find out whether you're the kind of person suited to serve on this king of jury or not, okay?

A Okay.

Q Now, Mr. Rand, I fell like you have a right to know what our position is right now. Our position doesn't really count and your does, but I want you to know where we're coming from. The State of Texas is actively seeking the death penalty for Thomas Joe Miller-El, that man sitting right down there. We feel like we could present to twelve jurors the type and the quantity of evidence that will convince them to find him guilty of capital murder and the type and quantity of evidence [1800] that will convince the jury beyond a reasonable doubt to answer those three questions yes that result in the death penalty. Judge McDowell has no options. If those three questions are answered yes by the jury, he must

assess the death penalty, period, no ifs, ands, or buts about it. If one of those questions is answered no, he must assess a life sentence. Again, he has no options, so its up to the jury what's going to happen in this case.

Now, with that—I know you had a chance this morning to fill out a questionnaire, but you didn't have a whole lot of time and we wee shuffling in and out of the courtroom while you where trying to do it. Maybe over lunch you had a little but more time to think about it , but would you tell us just briefly how you feel about the death penalty?

A That's kind of a touchy subject. In my own opinion, I think it could be enforced depending upon the crime itself, the circumstances of why someone was killed or could it have been avoided, that type of situation.

Q Okay. Have you given it any [1801] thought before today, Mr. Rand?

A No, not serious thought.

Q I understand that you haven't had a whole lot of time to think about it today, since you just found out three or so hours ago what the situation was?

A I think I've always pretty much had that same attitude toward it, though.

Q That was going to be my next question, how long you have felt the way that you do now. You're now married, are you, Mr. Rand?

A No, sir.

Q Did you grow up here in Dallas?

A Yes, I did.

Q Are your parents here?

A Yes.

Q Would you venture a guess as to how your parents might feel about the death penalty?

A No, I couldn't because we haven't talked about it.

Q You—all haven't discussed it at all?

A No.

[1802] Q Okay. Do you have any brothers and sisters?

A Yes, one of each.

Q What about them, do you have any idea how they feel about the death penalty?

A No.

Q Okay. Well, you say you've felt this way for a period of time. Let me just tell you briefly, the death penalty in Texas only applies to , what we call, capital murder and that is murder in a specific situation or a specific set of circumstances; one, the killing of a police officer or a fireman when they're on duty or the killing of a prison guard. That's capital murder. Another type, as I think the Judge mentioned this morning, is a mass murder like we had at a bar a year or two ago. The third kind is what we're dealing with here. As the judge mentioned; it's what we call murder plus. It's murder in the course of committing another offense. In our case, it's the offense of robbery.

Basically, what we've alleged in the indictment, Mr. Rand, in that this Defendant, Thomas Joe Miller-El, did knowingly [1803] or intentionally cause the death of another individual and that's murder, plain murder, but we've gone on further and said that he cause the death of that individual while in the course of committing or attempting to commit the offense of robbery. Now, we've got murder in the course of committing robbery. Is that the kind of thing that falls within your idea of a crime for which the death penalty should be considered?

A Yes, because of the murder knowingly. It wasn't a case of, say, self-defense or an accidental type thing.

Q Okay. Let me just touch on that for a minute, since you brought it up. We talked about murder in the State of Texas. We're excluding thing like self-defense or accident or insanity. If something was done in self-defense and the jury finds that it was done in self-defense, then that person is not guilty of the offense of murder. By the same token, if it's an accident, they didn't knowingly or intentionally cause the

death of someone, but it was an accident, then it's not murder. It's a not guilty or maybe an [1804] involuntary manslaughter or something like that, but it's not murder. If a person is found to be insane, they're not guilty if they were insane at the time they committed the offense.

Basically what you're telling me is, you could consider the death penalty for this type of case; is that right?

A Yes, sir.

Q Now, Mr. Rand, I don't like to pidgeonhole people and I don't really like to put people into categories, but I guess it kind of serves a purpose for me in this situation. I guess there are about four categories of people who come in and talk with us on cases like this. The first category is the person who comes in and believes in the death penalty, believes strongly in the death penalty, and says "I can sit on a jury and I can listen to the facts and I can assess the death penalty if it is warranted. I can handle that." The second group would be a person who believes in the death penalty. There's no question about that, but for moral or philosophical or religious reasons, whatever, [1804] they don't feel like they're the type of person who can sit on the jury and actually be involved in assessing the death penalty. They feel it's right and they feel it serves a purpose, but they don't feel like they could be the ones to actually do it. The third group is a group of people who are against the death penalty, but they don't really feel all that strongly about it. If called upon to serve on a jury and answer some questions, they could do that even knowing it would result in the death penalty. Although they don't really believe in it, they just don't feel that strongly one way or the other. The fourth group is a group that doesn't believe in the death penalty and will not be involved in assessing the death penalty under any circumstances whatsoever. Can you give my an idea of where you fit in those groups?

A Probably in between the first two, sitting in the jury an being able to say, "Okay, he's guilty." And being able to do that. But again, somewhere along the line, I would probably think to myself, you know, "Can I do this?" You know, right now I say I can, [1806] but tomorrow I might not.

Q Okay, Well, let me just kind of—you know, lawyers, when we're picking juries and talking about things, we kind of talk in the abstract. We talk about, well, could you do this in a case, could you give the death penalty in some case, somewhere, you know, but now, as you've realized, I guess, from this morning, this is real. We're here now and we're talking about that man sitting right there. In this case, if the evidence is presented the way we anticipate it will be presented, we will ask you, number one, to find hum guilty of capital murder. We will ask you to find that the answer to those three questions are yes, a yes answer to each of those three. Now what that means is, that man right down there, Thomas Joe Miller-El will be, at some point, taken to Huntsville, Texas and he'll be placed on death row and, at some point, he will be taken to what's called the death house in Huntsville, Texas and h will be strapped onto a gurney and an IV will be inserted into his arm and, as he lays there, a substance, lethal substance, will be injected [1807] into him until he is dead and that will be as the result of the verdict that twelve jurors rendered in this particular case. Now, I don't say those things to scare you or to make things seem horrible, but I feel—it's just like applying for a job, Mr. Rand, we feel like you need to know what you're getting into because once you have a seat over there, it's too late to say, "Hey, wait a minute, I just can't do something like that." Although we can't go into the facts of the case and we can't go into any of the circumstances surrounding the case, I want to tell you as much as I can about what you're going to be dealing with so you can tell me now whether you can serve or not serve on this kind of case. Let me assure you of one thing, I told you that we have talked to thirty-seven people or thirty-six before

you and we have two jurors. It's no great sin of it's not bad citizenship or something like that if you can't serve on this jury. It's a big decision and it's—

MR. CUNNINGHAM: You Honor, we're going to object to counsel for the State inferring that this [1808] panelist cannot serve on this jury. Everything that he has said so far indicates that he is qualified both by the law and by the questions that Mr. Nelson has asked him.

THE COURT: Overruled, Go ahead.

Q I don't mean to infer anything on way or the other, Mr. Rand, but you made the comment that you don't know what you're going to feel like tomorrow when it rally comes down to it and that's why I'm asking you. Nobody is going to force you to do something that's going to violate your conscience or bother you so much that it's going to affect you deeply and emotionally for the rest of your life. No one is going to ask you to do that. I go back to my job analogy. The Judge told you about the oath that you would have to take if you're going to serve on this case. I will a true verdict render according to the law and the law and the evidence. Some judges put so help me God on it and some don't, but that's the oath. You don't [1809] have to take the oath. It it's going to bother your conscience or you just don't feel that you can ,in good conscience, do something like that, no body is going to ask you to do that. Again, I've rambled on and rambled on about things and I'm not giving you much time to talk or think, either one, but I don't mean to do that. It's difficult not sitting over there right now, I know that, but we need to ask you what—do you feel like you could serve on this kind of jury and answer those questions yes, if the evidence calls for it, knowing that, without question, without option, that results in Judge McDowell assessing the death penalty for that man sitting right down there? Do you feel like you can do that?

A Yes, I do.

MR. WEST: I'm sorry, what was that?

A Yes, I do.

Q Okay. Now, you hesitated a few minutes ago and –

MR. CUNNINGHAM: Your Honor, we'll object to that. He didn't hesitate.

[1810] MR. MACALUSO: Excuse me, Judge. There's nothing wrong in making a legal objection, Judge, but—

MR. CUNNINGHAM: Your Honor, we would object to he statement by Mr. Nelson that he hesitated. The prospective juror did not hesitate. The first time he nodded his head and the second time he said yes and then the third time he said yes.

MR. MACALUSO: That's not a legal objection, Judge.

MR. CUNNINGHAM: Your Honor, I object to him inferring that the prospective juror did something that he did not do.

THE COURT: I think Mr. Rand is taking care of himself pretty well. Overruled. Go ahead.

Q Let me rephrase what I was saying, Mr. Rand, and, if I say anything at anytime that misstates anything you've said or if there's anything you don't agree with, I hope [1811] you'll tell me, I think you will. You've been talking and you're strong enough to tell me if I say something wrong of something you don't agree with. I want you to, but I remember you saying a few minutes ago that, well, you could today, but you aren't sure of how you'll feel tomorrow. That's what I was coming back to, have you given it enough thought now that you fell like you're pretty certain you could do something like that?

A Yes, I do.

Q. Okay, So if we seat you over there and we prove beyond a reasonable doubt that this Defendant down here

knowingly or intentionally caused the death of another individual without any legal justification or excuse and he did it while in course of committing or attempting to commit robbery, you will find him guilty of that , if we prove it to you?

A Yes.

Q Okay. Now, the burden of proof stays here. It's always here and we have to prove beyond a reasonable doubt and you'll make us do that, I take it?

[1812] A Yes, I would.

Q Okay. And you're telling us, that further, if after you've heard all the evidence, the answer to each of those three questions is yes you can answer those questions yes knowing that the result would be that that man would be executed right down there?

A Yes, I could.

Q You're telling me you can do that?

A Yes.

Q Now, Mr. Rand, under the old system, up until about thirteen years ago, the jury, on a capital murder case, actually went out on punishment deliberations and put on the verdict form life of death. There was no answering questions. Thirteen years ago the legislature implemented this procedure, using these questions and saying life or death, even though, you understand, the effect is the same. We're getting to the same place, but we're just using a little different road to get to it.

Now I guess that's put in there [1813] as kind of a buffer and that brings me to my next question. If after you've listened to all the evidence and heard all the evidence, if you're so mad, so enraged by what you heard that you thought this guy has to have it based on the facts, that's the way you feel, but we present evidence and we don't prove the the answer to question number two is yes, in spite of your feelings and in spite of you thinking you're so mad that he's

got to have it, that's all that is good for him, could you still answer that question no realizing that it would result in a life sentence rather than a death sentence?

A If it wasn't proven to me.

Q Okay. The other side is, if we proved to you that each of those questions should be answered yes, beyond a reasonable doubt we proved that to you, even though you feel that he should get life sentence, can you answer those questions yes knowing that results in him being executed, even though you personally feel he should get a life sentence?

A Yes.

[1814] Q Any problem with that at all?

A No.

Q Okay. Now, Mr. Rand, we talked a little bit about murder a few moments ago and you mentioned that you could consider the death penalty if there was no self-defense and no accident and that kind of thing. Let me touch on that again. If we proved to you—and we aren't saying this going to happen in this particular case, but it might. Under this indictment, we have to prove to you murder in the course of committing or attempting to commit robbery. If we present evidence to you and all we prove is murder, he knowingly or intentionally caused the death of another individual and we don't prove anything about robbery at all then, would you agree with me, all we have then is just straight murder, not capital murder—

A Yes.

Q —because we don't have the extra crime? Okay. Now. When we talk about murder, we're saying knowingly or intentionally caused the death of another individual. We aren't talking about self-defense where people were in [1815] a fight and one guy pulled a knife an the Defendant shot him or something like that. We aren't talking about accidents where it wasn't knowingly or intentionally. It was an accident. We aren't talking about insanity where the law says

the man was insane. We're talking about the person knew he was going to kill, intended to kill and killed without any legal justification or excuse whatsoever. Okay. Even if it was a killing in the heat of passion where someone is just so enraged about something that had happened to a member of his family or something that they went and shot the guy that did it, that's not murder. That's voluntary manslaughter. It's not murder. What we're talking about is knowing or intentionally causing the death of another individual, no in the heat of passion or without any legal justification or excuse whatsoever. Okay. Are you with me on that?

A Yes.

Q Okay. What do you feel should be the minimum possible punishment for the knowing and intentional taking of another human being's life without any legal justification or excuse?

[1816] A I think I could still go with the death penalty on that.

Q You would still go with the death penalty on that. Okay. So you feel, if one person takes another person's life, that kind of—I guest ht phrase I've heard used from time to time is an eye for and eye kind of situation, is that right, one person takes another person's life, he should forfeit his life?

A Yes.

Q Okay. Would you ever, ever consider a punishment as low as fifteen or twenty years?

MR. CUNNINGHAM: Your Honor, we would object to the form of the question in that the law says – the law sets out what the range of punishment is. I think it is being totally unfair to this prospective juror to try to commit him to a particular number of years without telling him what the range of punishment is and also telling him what the law says his [1817] duty would be.

MR. NELSON: I'm not trying to commit him, Judge. I'm just asking what he can consider, what he can think about, what his feeling are.

THE COURT: I'll overrule the objection, Mr. Cunningham. I'm going to give the lawyers, as you know, a lot of leeway here during voir dire to approach subjects the way they want to as long as the get to the right point eventually. I think we'll see that, so I'll overrule the objection.

Q After all that, Mr. Rand, we're back to my question. Do you feel like for the knowing and intentional taking of another human being's life without any legal justification or excuse could you even consider a sentence as low as fifteen of twenty years?

MR. CUNNINGHAM: Your Honor, we'll object to that question in that it improper because he [1818] left out if it is proved beyond a reasonable doubt in the proper facts and circumstances of that case.

THE COURT: Reask the question, Mr. Nelson.

Q Mr. Rand, maybe I didn't make myself clear. I thought I did. Obviously, if we don't prove the case beyond a reasonable doubt, you're going to find somebody not guilty, right, because that's our burden of proof?

A Right.

Q But assuming that we prove that the person knowingly or intentionally, no accident, not self—defense, knowingly or intentionally kills another human being without any legal justification or excuse whatsoever, then could you ever consider a sentence of fifteen years, down in that range?

A If that's the maximum penalty, yes.

Q If that's the maximum penalty?

A Yes.

Q Okay. Mr. Rand, the law in the [1819] State of Texas says that the maximum penalty for the offense of murder, not

capital murder, but simple murder, is ninety—nine years or life and a fine of up to $10,000.00. That's the maximum. I take it you wouldn't have any trouble considering the maximum, if that were the maximum, is the right?

A Right.

Q If you had your personal way, you would want to consider the death penalty on that situation?

A Well, if it was proven that it was a capital murder.

Q Okay. That's all we ask. Obviously, you can't give the death penalty for a regular murder case?

A No.

Q The minimum under the laws of the State of Texas is five years for the offense of murder. Now, could you, again, for the knowing or intentional taking of another human life, under the proper facts and circumstances, give a sentence of five years for knowingly and intentionally taking another human like?

MR. WEST: Your Honor, [1820] again, improper question, improper as to the form. If he felt as though the case—I'd ask that this be added: If he felt as though the fact and circumstances warranted an assessment of five years. He's trying to get him to commit to five years without telling him if he actually felt it warranted a five year penalty. I would object to the form of the question.

THE COURT: Mr. Rand, the question is, in a proper case, if the facts and circumstances warranted it, where you had found someone guilty of the offense of murder and you thought that five year sentence was proper could you assess it?

MR. RAND: Yes, if that's the sentence that could be given.

THE COURT: Go ahead, Mr. Nelson.

[1821] Q Mr. Rand, you, as a juror, would decide what sentence is going to be given. Okay. You wouldn't be required to give five years. You aren't required, as a juror on

a murder case, to give five years. You can give anywhere up to life of ninety-nine years, I thought I heard you saying – and I was having a little trouble hearing because you were talking to the Judge—that you could do that if that was what you had to do?

A Yes. If that what was put upon me, to say, "Okay, he's guilty and we're going to give him five years," would I go along with that, yes.

Q Okay. Somebody is not going to tell up that you have to give five years. That's your decision. If you can't consider and assess five years, under the proper facts and circumstances, the that's fine. Nobody is going to argue with you, but we're just trying to find out because, again, we're going to have to have twelve people who we feel are suited to serve on this particular kind of case. This is part of that, so I guess I'll ask the question [1822] again. Could you give five years in a proper case where the facts and circumstances justified it or would you, from what you've told me, want to give more than that?

A I want to give more.

Q Okay. Are you telling me, if the facts and circumstances—well whatever the facts and circumstances, you could not give a five year sentence for the offense of murder, knowingly or intentionally taking another human being's life?

MR CUNNINGHAM: Your Honor, we'll object to the form of the question because, again, it leaves out the – what the law says, if he felt under the facts and circumstances of that case it warranted five years, could he give five years.

THE COURT: Reask the question, Mr. Nelson.

Q You said earlier, Mr. Rand, that you even thought a person like that should get death. If you were setting the laws, you would allow death to be considered, is that right?

[1823] A Yes, I would have it consider it.

Q Okay. But is there any way that you could consider five years for knowingly and intentionally taking another person's life?

MR. WEST: Your Honor, again, I would object and my objection is that it is an improper question. Improper question in that the question should be, under the proper facts and circumstances in Mr. Rand's mind, if he thought the facts and circumstances warranted it, could he consider and also give five years for murder as Mr. Nelson described it?

THE COURT: Do you understand the question, Mr. Rand?

MR. RAND: I think so, What he's saying, warranted, does he mean, okay, this what is going to be given or exactly what is it?

THE COURT: Well, I think you've answered the question properly, Mr. Nelson, go ahead. [1824] Reask the question.

Q Mr. Rand, again, when we talked about—when you've heard me use the work warranted, no one is going to dictate to you as juror, what the sentence must be. Nobody is going to dictate to you that it must be five years, any more than anyone is going to dictate to you that it must be twenty years or it must be forty-five years or anything else. If you're a juror on a murder case, you're the one who is going to make that decision yourself. What we're asking you, basically, is—

you've already found somebody guilty of knowingly or intentionally taking another human life without any legal justification or excuse, Are with me to that point?

A Yes.

Q Okay. Once you've found them guilty of that, could you ever, under the proper facts and circumstances, vote for a sentence for five years in the Texas Department of Corrections for the offense?

MR. CUNNINGHAM: Your Honor, we will object to the form of the question because it eliminates that [1825] part that the law says it should have and that is, if he felt that the facts and circumstances of that case called for five years, could he consider it and do it.

THE COURT: Go ahead ask the question.

Q Mr. Rand, let me just put it as dimply as I can put it. Would y ever feel five years was justified under any fact and circumstances for the offense of murder?

A No.

THE COURT: What was you answer, sir?

MR. RAND: No.

Q You've told us, I think, that you feel death should be proper. If you were setting the law or you were making the laws yourself, you would feel that death should be proper consideration under those circumstances?

Q Yes, it should be considered.

Q Okay. Now, Mr. Rand, I remember an old show years ago called Queen for a Day. If you were governor for a day and you could set the minimum punishment in the State of [1826] Texas for the offense of murder as I've stated if out, knowingly or intentionally causing the death of another individual, what would you set?

A Probably the maximum that you gave me, ninety-nine or life.

Q Okay. You would set that as the minimum?

A Yes.

Q Okay. And there's no way you could ever consider and give five years for that offense, is that right?

MR. CUNNINGHAM: Your Honor, again, we object to the form of the question, It's an improper question the way he asked it of this prospective juror.

Q Under any facts and circumstances, as long as it's a murder the way I've laid it out?

MR CUNNIGHAM: Your Honor, we will object to the form of the question. It's an improper question.

THE COURT: Ask the question [1828] again or I'm going to take it over.

Q Mr. Rand, am I confusing you?
A No.
Q You think you understand what I'm asking?
A Yes.
Q Okay. I certainly don't mean to confuse you and, if I didn't tell you at first, I'll tell you now. If I am or if you have a question, ask it, because I want you to be clear on what we're talking about.
A Okay.
Q I thought I understood you to say, if you could set the minimum at life or ninety-nine years and you would have death be a consideration?
A Yes.
Q Now, I thought you told me that, under no facts and circumstances, ever, would you consider a sentence of five years; is that right?
A Right.
Q Okay. Mr. Rand, I told you up front that I'm not going to argue with you and [1828] I'm not. I would guess from what you've told me—and you've been pretty definite about it—even if I sat here and talked to you for two weeks, I wouldn't change you mind on it, would I?
A No.
Q And that's the way you feel about it and that's the way you're going to feel about it, is the right?
A Right.

Q Okay. I don't have any problem with that and nobody is going to argue with you or try to change you mind at all. I guess nobody could, if they wanted to, is that right?'
A Right.
Q Okay. Mr. Rand, no one has a right to argue with you about that and no one should argue with you about that because that's your opinion and that's why we have up here, is to find out how your feel about things, so I'm sure nobody else is going to argue with you about it, either. I'm about of time and I've thrown a lot of stuff at you. You've been very open and honest with me and I appreciate that. Do you have any questions for me? Is [1829] there anything else we need to touch on here that I haven't touched on?
A No. I think everything is pretty clear right now as far as what you've asked me. I think I've understood everything.
Q Okay, I don't think I have any other questions for you, Mr. Rand, if you don't have any for me, There's no way, even if I kept discussing it with you, I could change your mind, so I'm not going to bother you any more. I appreciate very much your time and your patience with me and the openness of your answers. These lawyers will probably want to talk to you a little bit. Thank you very much.

MR. NELSON: Your Honor, we'll submit the juror.

THE COURT: I'll add a couple minutes onto your time to cover that submission, if you want to.

MR. WEST: If it please the Court.

THE COURT: Go ahead.

[1830] EXAMINATION

BY MR. WEST:

Q Mr. Rand, my name is Royce West. How are you doing this afternoon, again?
A Okay.

Q Okay. First of all, let me assure you that no one is arguing with you. Did you feel as though Mr. Nelson was arguing with you about anything?

A No, not really.

Q Okay, I'm not going to argue with you about anything, either , okay?

A All right.

Q Now, it's okay to feel the way you feel about certain matter. There's no problem with that at all. In fact, I would defend your right to say what you want to say. Do you understand what I'm taking about?

A Yes.

Q Okay. Now, Is this your first time ever to come down for jury duty?

A Yes, it is.

[1831] Q Okay. It's an experience and a half?

A Yes, it is.

Q Okay. Do you consider yourself basically a law and order person?

A Yes.

Q Do you feel as though you the law?

A Yes.

Q And that everyone should follow the law?

A Yes.

Q Okay, How much do you know about the judicial system?

A I guess not a lot.

Q You realize that everybody has a right to be tried by their peers?

A Yes.

Q Now, one thing that Mr. Nelson was harping on was your ability to take into consideration, under the proper set of facts and circumstances, and assess the minimum and also the maximum penalty in a murder case.

Q Okay, Now, no one is trying to get you to commit to anything, you realize, as [1832] he indicated, the minimum

for murder is five years and the maximum is ninety-nine years, life and an option of fine of $10,000,00. Our legislature set that range of punishment. The people down in Austin who make the laws, they set that range of punishment because you can have fifty million different fact circumstances that call fall within that range of punishment, so they wanted to give people that particular range to work with when they're serving on a jury and when they're making a determination as to what the proper sentence should be. Do you understand that?

A Yes.

Q Okay, Now, I'm not asking you to commit one way or the other to saying that you would give somebody five years in the penitentiary. I'm not asking you to do that, but I'm asking you, if you felt as though you, if you felt as though the proper facts—number one, you found someone guilty of murder, okay—and circumstances existed in your mind, that under those facts and circumstance that you would, number one, consider and, if your felt as though the circumstances and the [1833] facts called for it, assess penalty of five years. I'm not saying that you have to—again, this is your first time down here. There's fifty million circumstances and you don't have to think of one in your mind, okay?

A Yes.

Q And you know that's what the law is, five years to ninety-nine years of life. I'm asking you, could you consider, under the proper facts and circumstances, assessing a minimum of five years confinement?

A If I had to.

Q Okay. If that's what the facts called for?

A Yes.

Q How, Let's explore that a little bit more. You said if you had to. You don't have to do anything.

A Right, Well, when I said that, I was meaning as to what you added onto it, if the facts—

Q If you felt the facts called for it?

A If that's what it called for, yes.

Q I'm kind of misunderstanding you. [1834] You said if that's what it called for. What do you mean?

A Okay, When I said that, I was meaning as of what you tagged onto it, if that's what the facts brought about to it and this was it. Myself and my preference would prefer to have more, but I would consider it.

Q If you felt as though the facts called for it, you could assess it; is that correct?

A Yes, I could.

Q Now, what I want to make sure that you understand, no one is trying to commit to saying " I will give five years." "I'll give life." What we have to know—and there's some confusion as to whether you can consider the full range of punishment, from five years to life. In your mind, if you said these facts called for it, even though a person knowingly and intentionally took the life of someone else without any legal justification such as self-defense or any legal excuse such as insanity, that he knowingly and intentionally took the life of someone, that I can consider the full range of punishment, for five years to life, [1835] and a $10,000.00 optional fine. I can consider it and, under the proper facts and circumstances in my mind, if I felt as though the facts warranted it or justified it, I could give that person five years?

A I could consider it.

Q And you could do it if you felt as though the person should receive five years; is that correct/

A If I felt that.

Q Okay. Understand something now. I'm not saying that you have to give it to a person. I'm saying, if you felt as though the facts and circumstances called for it, that you would give a person five years?

A I would consider it.

Q You said that you would consider its?

A Yes.

Q The law requires—and this is the law— that you no only be able to consider it but you would be able to do it, also, if you felt as thought the facts called for it, I'm not trying tog get you to commit to it. I just want to make sure you have an open [1836]mind to it.

A Well, I think I could, but I wouldn't want to—well, I couldn't then.

Q I'm sorry?

A Well, I few don't have that difference, I would say I couldn't because I couldn't consider—

MR. NELSON: Did he say could not?

THE COURT: I don't know.

MR. RAND: Right.

A Because I could consider it, now, whether I would like to or not, in my own opinion, I wouldn't want to. Is that what you're asking me?

Q You're saying that you wouldn't want to. I don't have any problems with that. I'm just saying, if you felt as though the facts and circumstances called for it in your mind—again, this is your first time down here and there's fifty million circumstances that could come up where a person knowingly and internationally took the life of someone else without and legal justification or legal excuse. I'm saying, you know, would you keep [1837] an open mind and, if you saw those farts and circumstances, would you, not only consider it, but also assess the minimum of five years?

A Yes.

Q You can do that? Again, I'm not trying to tie you down to saying you're going to give somebody five years, okay?

A Yes.

Q I'm not trying to tie you down to saying you'll give somebody life, either, but I want you to be able to, if you can, and you siad that you could, consider the full range, from five

years to life, and, if the facts and circumstances, in your mid, called for it, be able to assess the minimum of five years, which you said that you could, or assess the maximum of life, which you have to call it like you see it. No you understand what I'm talking about?

A Yes.

Q Can you do that?

A Yes, I could.

Q All right. Now, let me ask you this—Mr. Nelson basically asked you the same question. Was there some communication problem that you didn't understand what he was saying [1838] or what?

A Well, maybe what I was understanding from him was—they way I took it was what would I do. Okay, Your question was, could I consider or be able to. Yes, I could. Under his consideration, I would want more, but I could consider and give five years if I had to.

Q If you felt it was—

A Well, If that was that was adjustable.

Q I'm sorry?

A If that's what was adjustable under the facts and circumstances.

Q Yeah, that's all I'm saying. You know you may very well want to—let's get off that for a second. I see that you—what school did you graduate from?

A Skyline.

Q What particular cluster were you in?

A I came out of plastic technology, The first three years I was in automotive.

Q I was noticing some of the literature that you've read that dealt with [1839] automobiles. Again, would this be a fair statement, that people should obey the laws as handed down by our legislature?

A They should.

Q Okay would it be a fair statement to say that everyone should, in fact, try to be involved in voting and the jury

system and the criminal justice system, also? People should try to be involved in civic affairs is basically what I'm saying.

A If they prefer to.

Q Okay. Now, what are your thoughts about the criminal justice—have you ever just thought about the condition of the criminal justice system?

A No, I haven't.

Q I'm sorry?

A No, not just serious thought.

Q What are some thoughts that you've had about the criminal justice system?

A Well, possibly say a crime of maybe just robbery and then a separate crime o, say murder. Why could, maybe, the guy that murdered somebody go to jail for five or six years and that's it and maybe a guy that [1840] steals something from a Seven-Eleven has to go for fifteen.

Q So unequal Justice?

A Yeah, You know, it sounds kind of funny.

Q What doesn't sound—

A He, myself, being on the outside I'm looking at what is there on the pager in the news I don't know the facts or anything, really, behind it, but all I see is, okay, this man got fifteen years for robbing a Seven-Eleven and this guy got five of a killing.

Q Do you understand that there are probably a lot variables that you and don't know about?

A Yes, That's what I'm saying. I don't know all of the background to it.

Q Exactly, because there may be one situation where a person gets five years for robbery and a person gets fifteen years for murder?

A Yes.

Q And it's a plea bargain as opposed to a jury trial or a trail before the Court, There are a lot of variables involved; [1841] do you understand?

A Yes.

Q It gets basically back to what I was talking about. There's a wide range of punishment open for various types of offenses. Did you know that aggravated robbery was a first degree felony offense and that the minimum you could get was five years just like in a murder case?

A I didn't.

Q Okay. Did you know that burglary of a home is a first degree felony just like murder. Just like aggravated robbery and the minimum you could get is five years and the maximum you could get is ninety-nine year or life and an option of a fine of $10,000.00.

A No, I didn't.

Q There are numerous other first degree felonies; also. Now, the only thing that the law requires, in order for you to serve on this jury, is you be able to consider the full range of punishment, that being from five years to ninety-nine to life, and, under the appropriate facts and circumstances, in your mind, if the facts called for it and you [1842] feel as though it's justified, be able to assess the minimum of five years and, if the facts called for life, be able to assess life. Can you do that?

A (No response.)

Q Again, this is an individual thing, being able to consider it and, if you believe in your heart that the facts call for it, be able to give five years. I believe you indicated earlier that you could.

A Yes, I could.

Q Can you do that sir?

A Yes, I could.

Q How, you're telling Mr. Cunningham and myself, as Mr. Miller-El's attorneys, that you could consider and assess five years if you believed in your heart that the facts called for it?

A Yes.

Q Now, do you understand what Mr. Nelson and I were talking about concerning the minimum sentence of five years?

A Yes, sir,

Q Do you have a full understanding of it?

[1843] A Yes.

Q And basically the full range of punishment?

A Yes.

Q Mr. Rand, I believe you're qualified to serve on this jury. Thanks you, very much,

MR. WEST: I'll pass the juror.

THE COURT: I'll hold that the juror is qualified on your submission, Mr. Nelson. You still have about a minute left on your record of time.

[1844] EXAMINATION

BY MR. NELSON:

Q Mr. Rand, again, the last thing I want to do is argue with you myself, but you realize that you told me one thing and told Mr. West something else and I guess there is some confusion there and I don't want you to be confusion there and I don't want you to be confused. You kept going back to if it was up to you or what you would do. I think words were used, you know, what would I do. I thought you told me that, if you were making the decision, you would want either life or death for this type of offense, is that right?

A Yes, but the way he questioned me, I could consider five.

Q Okay. What we're talking about, if you're on a jury and you're sitting over there on the jury and you hear the facts and it's been proved to you beyond and reasonable doubt that this Defendant Knowingly or intentionally took the life of another human being, killed them, knew he was going to do it and did it without any legal justification or excuse whatsoever—it's easier to talk in the abstract. We're talking

about a guy who has [1845] been found guilty of killing another human being and you're sitting on that jury, We're just asking you to be as honest about it as you possibly can be. I know that's what you're been trying to do, but being just as honest about it as you can with us and with yourself; could you really consider and assess a five-year sentence under any circumstances?

MR. CUNNINGHAM: Your honor, we'll object to that as an improper question in that, if he felt that the proper sentence was five years.

THE COURT: Do you understand that, Mr. Rand?

MR. RAND: Uh-huh.

THE COURT: Go ahead and answer the question.

A Okay, I could consider it.

Q If you were sitting as one of the jurors in that box, could you sign your name saying, "I'm not just thinking about it. I'm going to give this guy five years. He killed somebody. He knew he was going to do it. He did it, but I'm going to give him five years."?

[1846] MR. WEST: Your Honor, again, that's an improper question. I f the facts and circumstances call for it and he believed in his heart that the person should get five years. Improper question.

THE COURT: Ask the question, Mr. Nelson, one more time. Your time is up though, but go ahead and ask it one more time.

Q Mr. Rand, again, I'm just trying to find out what you really feel, down inside what you really okay, You've convicted somebody of murder, not voluntary manslaughter, not self-defense, no accident You've convicted them of murder, knowingly or intentionally cause the death of another human being and you're found them guilty beyond and reasonable doubt and you're sitting on the jury You've heard

all the facts and circumstances. You know everything you're going to know. You've said, in a proper case, you could consider five years, but you also kept saying that, if it were up to you, in [1847] your heart, you would want to give more. AM I right about that?

A Yes.

Q Okay, so even if the facts and circumstances justified it where you could consider it, being real honest about it, could you give it?

A Yes, I could Is there any question about that, because you've changed from what you told me before?

A No—well, I don't know. From the first time you adked me to now, if maybe the way you said it or my understanding was different, but I could consider it and if shown, yes. But I could consider it and, if shown, Yes. But tI could consider it and, If shown. Yes. But under the same token, I would think that I would want more. If it was proven, then okay, he gets ninety-nine years, I would go that way, also.

Q You understand that nobody is going to prove to you—

MR. WEST: Excuse me. Your Honor, I think the state's time is up we keep going over it. He's already said that he could [1848] consider it and, under the proper facts and circumstances, he could do it. The State is asking for additional time and the Court has already told him that his time was up. I thought he had already asked his one question else.

THE COURT: Mr. Nelson, bring it to a close.

MR. NELSON: I'm trying to, Judy, but he said something else in the same area that I want—

THE COURT: I think probably the lawyers could be here all afternoon the way we're going.

MR. NELSON: Is the Court stopping me at this point?

THE COURT: Go ahead and ask one more question.

Q I've forgotten exactly the words you used now, Mr. Rand, but you're telling us—well, you said if it was proven to you that he had to get ninety-nine years—I think the words you used were something to that [1849] affect—or it was proved to you that he had to get five years—

A That it was adjustable on that case.

Q You understand that it is always going to be your decision? It's up to you. Nobody is going to prove to you that anybody has to get five years and, if you couldn't consider and assess five years in a proper case, then that's fine. Nobody is going to get down on you for being a bad citizen or anything else because you can't. We just need to know.

A I could consider it, but I couldn't sit here and say that I would give it to him. Is that what you're asking?

Q Well, we can't commit you right now to saying htat you would do it.

A I could consider it but I couldn't say whether I would give it to him.

Q The law says consider and assess. Okay. Not only consider, but you have to be able to tell us that you could give it.

A Yes, I could.

Q You're saying that you could?

MR. WEST: He's already [1850] answered the question two times, Your Honor.

THE COURT: Well, he's through now. Mr. Rand, the only question I want to ask—and you're probably tired of these lawyers asking you questions, but let me sum it up to make sure that I understand. The law says that everyone of these twelve jurors who are going to be sworn in thie case has to have an open mind to the entire range of punishment that might be provided for in this particular case. Now earlier on—and we're not even arguing about this—you told the

State that, in a capital murder case, if they proved those questions to your satisfaction beyond a reasonable doubt, you could answer them yes. We're not talking about that. We're talking about a case where you, as one of the twelve jurors, has found a [1851] Defendant guilty of the offense of murder, which is the intentional or knowing or both causing the death of some individual by some manner or means. The punishment range for that offense of murder, under our law—it applies in all murder cases and not just this one. But in any murder case—is a prison sentence of not less than five nor more that ninety-nine years or by a life sentence. I don't know if the lawyers mentioned it or not, but there is also an optional fine of up to $10,000.00 if the jury wants to fine in addition to a prison sentence.

Now, what the law say is each juror who is seated must be able to set a punishment somewhere within that range depending on what the facts and circumstances of that particular case tell you, as an individual juror and then [1852] you working together with the other eleven jurors, is a proper punishment in the case. Now, what the lawyers are asking you is, and it was asked several different ways at several different times—now, let me qualify my question by telling you some of the things the lawyers said.

You don't have to imagine a case it would take for you to assess any particular punishment. In other words you don't have to be able to tell m, well, I could give ninety-nine years if it involved killing a baby or something like that or I could give five for this or that. In fact, the law wouldn't even let you do that because that means in my mend and, I think, in the law's mind that would be the only case in which you could do that particular thing. The law doesn't require you to imagine the facts [1853] it would take you, in your mind, to vote for some particular punishment. The law does say that you have to have an open mind to the entire range of punishment so, if you heard a set of facts in a murder case,

after hearing all those facts and those circumstances, having found the Defendant guilty of the offense of murder—and we talked about what that was, but you found him guilty of murder—if the facts and circumstances presented themselves to you and in that particular case you thought a proper punishment was a five year sentence, which is the minimum sentence, you could and would vote to assess that as the punishment in that case. Now, the question to you is, in a proper case, if the facts and circumstances warranted it in your mind, could you and would you vote to assess a five-year sentence?

[1854] MR RAND: Yes, I think I could keep an open mind.

THE COURT: Can you give me a yes, I would—

MR. RAND: Yes.

THE COURT: —or a no, I wouldn't

MR. RAND: Yes.

THE COURT: I'll hold that he's qualified, Mr. Nelson. What says the State?

MR. NELSON: At this time, Your Honor, the State would exercise a preemptory challenge.

MR WEST: Your Honor, I want the record to clearly reflect that—

MR. NELSON: Could we take this up outside—

MR. WEST: Judge, I think it should be taken up in front of Mr. Rand's face.

THE COURT: Well, I'll let it be done at this time.

MR. WEST: I want the record [1855] to clearly reflect that Mr. Rand is a black male and he's twenty-three years of age.

THE COURT: Mr. Rand thank you for your patience with us, first of all. You will be excused for service in this case. If

you would leave your badge with the bailiff as your go out—this is off the record, Pam.

(Whereupon, an off-the-record discussion was held after which the following proceedings were held.)

MR. NELSON: The State exercised its preemptory challenge because Mr. Rand was ambivalent about the death penalty and at the first of the voir dire, his ability to serve on a jury like this and he stated himself that he wasn't sure whether he fitted in category on where he could serve on the jury or category two where he could not. That was the [1856] State's concern for exercising a preemptory challenge in this case.

THE COURT: Let's take a short recess so I can make a phone call I should have made two hours ago.

Mr. MACALUSO: Judge, If I may say something. I realize that everyone has the right to make a legal objection, I guess, at the time. I didn't really actually keep count this last time, but if there were ten objections over this very limited area, ten nonlegal objections, to questions—and I miscount—all I'm asking, Judge, is, if we stand up and make a nonlegal objections, the Court call it to out attention, as I've ask the Court to do with the other lawyers in this case, if we're ever going to get a jury in this case.

MR. CUNNINGHAM: Your Honor, the only reply we would make to

* * * *

[2000] CARROL S. BOGGESS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning. I'm trying to crank up on time here this morning and get my voice going here. Ma'am, let me begin by reintroducing most of the people who will be involved in this case. We were introduced to you the other day. My name is Paul Macaluso and the man that just walked out, who will be seated right next to me in just a moment, his name is Jim Nelson. Once the trial begins, we will be joined by another lawyer. His name is Norman Kinne. We're all assistant district attorneys and we work for Henry Wade who, I'm sure you know, is the district attorney here in Dallas. He's designated us as the lawyers to represent the State in this case.

Now, the gentleman that I'm pointing to at this moment is Mr. E. Brice Cunningham.

[2001] MR. CUNNINGHAM: Good morning. How are you?

Q I imagine in not too long he will be joined by Royce West. He will be seated between the Defendant and Mr. Cunningham. Mr, Cunningham and Mr. West are defense attorneys who have been appointed by the Court to represent the Defendant. He is seated to your very far right. You can see him, I think, if you lean forward. He's in the powder blue suit there. His name is Thomas Joe Miller-E1. He is charged with capital murder and he's the Defendant. Now, the reason why I've taken—that's Mr. Nelson.

MR. NELSON: Hi.

Q The reason why I've taken the time to reintroduce every one here is to let you hear our names again and then reacquaint you with the roles that we all play in this case so you know what we do or are supposed to do. I would just like to ask you if you know or recognize any one of us?

A From yesterday.

Q Other than from yesterday?

A No.

[2002] Q I know your husband works in the district clerk's office. I think I know—

A I'm sure you know him. He's been here a while.

Q

Q He's been around for quite a while, hasn't he?

A Yes.

Q I don't think that we have ever met. I don't recall having met you, but I see Joe here all the time. As you will know, Ms. Boggess, you are a prospective juror on this capital murder case. As I'm sure you know at this time, capital murder is a very, very serious offense. In fact it is the most serious offense under the laws of this state, as you well know, serious because of the nature of the offense. Obviously it involves a capital murder. Equally as serious, I suppose, because of the two possible penalties for a person who is. convicted of capital murder. You know if a person like Thomas Joe Miller-E1 is convicted of capital murder, then he can receive only one of two possible penalties. One is a sentence of death by lethal injection [2003] in his arm or a sentence of life in the Texas Department of Corrections.

You can see obviously how serious everything is connected with this type of case. Probably because of that, Ms. Boggess, the law allows us to talk to you individually as we're doing now. Have you ever been down here on jury duty before?

A Uh-huh. I don't remember the year. I think it was a couple of years ago.

Q It was a civil case, do you think?

A Uh-huh.

Q If you were talked to by the lawyers as I'm pretty sure .you would have been, you were probably talked to when you sat out there in the gallery, weren't you, and you were asked questions and you answered up in front of everybody else. That's fine for most cases because most cases don't involve the death penalty and how you feel about the capital punishment laws and the death penalty statute and so forth and so on. The law allows us to .talk to you individually, kind of semi-privately, like we're doing now because they want you to relax as much as you can. Are you [2004] a little bit nervous?

A No, not really.

Q Well, there is no need to be nervous because nothing you can say will be wrong. For that matter, it won't be right, just as long as you tell us how you feel. No one is going to quibble with you or quarrel with you, argue with you, try and talk you into anything or out of anything. You are the most important person here in this room right now and your opinion is the most important opinion. So whatever is on your mind, I don't care what it is, if it affects your service as a juror, you just tell us, all right, and you will be doing your job. If we ask the right questions, we'll be doing our job. Fair enough?

A Uh-huh.

Q Now, if you have a questions about anything, Ms. Boggess, by all means ask it because, you know, when you get on the jury you can't ask questions ordinarily of the witnesses and the lawyers and so forth. If there is .anything that you need to tell us, whether we touch on it or not, by all means let us know, all right, just in fairness to both sides.

[2005] Now, in fairness to both sides, let me tell you what our position is just from the very beginning. Ms. Boggess, we are actively seeking—that is, the State is actively seeking the death penalty in this case for that man right down there. It's only fair that we tell you right from the very beginning what

our position is and what we intend to be able to prove and establish once the trial itself begins and then, of, course, what would be expected of the jury on the basis of that .evidence. We are actively seeking the death penalty. That is, we intend to provide this jury with the type and the qualify of evidence—and that would' mean you if you were on this jury—that would convince the jurors beyond any reasonable doubt that the Defendant, Thomas Joe Miller-E1 was guilty of capital murder just exactly as he is charged.

Then in the second phase of the trial, once again, to be able to provide that jury with the type and the quality of evidence that would convince them beyond any reasonable doubt whatsoever that those questions that the judge will give the jury at the end of the [2006] trial should be answered yes. All yes answers, as you know, would result in the law requiring the Judge to sentence Thomas Joe Miller-E1 to betaken some day down to Huntsville, Texas and at an appointed time—the law designates the appointed time—he be taken to the death house to have a needle placed into his arm and thereafter have a lethal substance injected into his body to cause his death as the law requires under those situations.

I'm not trying to make this sound real gory or gruesome, other than the fact, ma'am, that it is only fair to you and every other juror—we've talked to about forty so far—to let you know exactly what the stakes. are in this type of a case. I think you know anyway, but it wouldn't be fair to you to lull you into some sense that this is going to be some kind of a—any other type of case when we know it's not and what the stakes are ultimately.

I think, as you well know, Ms. .Boggess—you're thirty-seven years old and you know the difference between fact and fantasy y or something you hear on TV or read [2007] about and then something when you're caught up right in the midst of it. Do you see what I'm getting at?

A Yes.

Q It's one thing to sit around and talk about what you might do in a situation, what you would like to do or what ought to be done and frequently—I know. I'm forty-three years old myself. I know that it is quite a different situation frequently when you're actually called upon to do something yourself. Do you see what I'm getting at?

A Yes.

Q That's what we want to know and that's why we're talking to you as intensively as we are. The reason I say that is this: You were asked about your feelings about the death penalty and whether or not you could actually serve in this type of case. As you well know, a lot of people have real strong feelings one way or the other about the death penalty, strong feelings one way or the other about whether or not they can actually serve on this kind of a jury because of their personal or conscientious feelings or religious or moral [2008] feelings one way or the other.

Now, I've done a lot of talking here so far as an introduction. Really what every one wants to hear is what you think and how you feel. I know you were asked this question yesterday and were given those three lines there to respond and very little time to really think about it, but could you share with us, Ms. Boggess, now that you've had a night to sleep on it, to think about it, what your feelings are really about the death penalty and whether or not you can actually serve on this type of case?

A Well, I believe I could serve on a case like this, but whether I want to or not is a different thing. I wouldn't want to serve and I wouldn't want to have that responsibility to do that, but if it fell upon me, I would certainly take it and pray to the Lord to help me get through it. My feelings about the death penalty are just as I said, if I believed that a person truly had committed a murder, a premeditated murder or a

murder—you know, intended to do something like that, then I would feel that it was my duty to judge that [2009] person and to decide whether or not that person, you know—

Q I gather from what you're saying you feel strongly, obviously, about murder?

A Yes.

Q That a person ought to be held accountable for a murder type offense?

A Right, or punished for any type of crime that they commit.

Q I notice you put down here on your questionnaire, "Do you believe in the death penalty?", "Yes—only in cases of premeditated murder." I think you went on to qualify it by saying for an intentional murder?

A Right. I wouldn't want—you know, like the Judge talked about, self-defense or an accidental thing or something like that. I certainly wouldn't want to judge a person on that.

Q We'll talk about that in some detail in just a second, but you understand that a person can only receive the death penalty in Texas for a capital murder. A capital murder involves a murder itself. That's a component of capital murder. It's [2010] what we call regular murder—actually it's not called regular murder. It's just referred to as murder.

Murder itself is not a capital offense. In other words, you can't receive the death penalty for what we call regular murder. For example, if I kill Mr. Nelson and just kill him for whatever reason I have for killing him, I cannot receive the death penalty for his murder no matter how violent or brutal or vicious it may have been unless he falls under -a particular category. For example, if he is a police officer and I murder him and I know he is a police officer, he's on duty, I can receive the death penalty for that kind of a murder. But if it is just Jim Nelson, the district attorney, I can't do that. I can't receive the death penalty because that's a regular murder. If I killed you or you killed me, you see, that's regular murder. That's altogether different in the range of penalty. If you kill

a jail guard or a fireman, mass murders, you see, murder for hire, those are capital murders. Otherwise, murder itself is a noncapital offence. Murder is a situation [2011] where one person knowingly or intentionally causes the death of another. You have to understand that that does involve a knowing and/or an intentional killing. I knew I was going to kill him. I intended to kill him. I killed him. Do you see?

Now, what the Judge said about insanity, self-defense, accident or a crime of passion, if you're on a jury and someone is charged with murder, but you believe or you have a reasonable doubt that someone killed as the result of insanity, self-defense, accident or a crime of passion—we'll talk a little bit more about in detail later—then you, don't make it a lower sentence, you see, because if you believe that it is one of those four things, it's not murder, you see, because those are legal defenses or legal justifications for somebody killing somebody else. Do you see what I'm getting at?

A Uh-huh.

Q If you believe that I killed Mr. Nelson because I thought Mr. Nelson was going to kill me or he came at me with a knife and I got my gun first and shot him, you see, then [2012] you don't give me a lower sentence because you thought I acted in self-defense. You find me not guilty just like I would have to find you not guilty if that were the situation and I were on the jury. Am I making myself clear?

A I suppose, but let me go back and say this: I'm not saying that I feel like I could impose the sentence myself—or I'm not going to be imposing the sentence; is that correct?

Q Uh-huh.

A I'm trying to figure out why you've explained all that to me. I understood that, but what I'm saying is, it's not the jury's—it's not my decision to say whether or not he gets the murder penalty or not because that's already been established. The fact is, is he guilty of the crime or not, is that not what the jury is—

Q Well, that's partially correct and then it's a little bit confusing because this is a fairly complex area of the law. Let's talk a little bit about that. You understand that in any criminal trial—you see, any criminal trial is conducted in two parts, [2013] whether it be capital murder or shoplifting. The first part deals only with whether or not a person is guilty or not guilty. In other words, if the State has accused somebody of capital murder or if the State accuses somebody of shoplifting, the State has the burden of proof in all cases. We have to convince you that the person is guilty of capital murder or shoplifting, whatever the case may be. That's the only decision the jury makes.

Let's say if you find him not guilty, obviously, the trial is over. If you find the person guilty of capital murder, then we go on to the second phase of the trial where' the penalty is determined. There is nothing automatic about somebody being given the death penalty just because they are convicted of capital murder. It's not automatic. There's an option there based on the answers to questions.

Now, years ago, up until about thirteen years ago, jurors, after they convicted someone of capital murder, would listen to whatever evidence may be presented in the second phase of the trial—although there [2014] is no obligation for either side to present any more. You may have to make a decision just on what you learned about the offense itself. After the jurors heard the evidence in the first part of the trial, heard all of the evidence, they would go back and actually decide for themselves did the person get the death penalty or should they get a life sentence or should they get some number of years. It's like in the movies. You know, you've seen those movies where the jury comes back and they say, well, we think he ought to hang for that or he ought to get the electric chair, whatever it was, and they actually voted for that. If all of them agreed it should be death, they all gave death.

Let me ask you, do you feel you're the type of person who could make that kind of decision directly?

A I've never been in that situation. I don't feel like I would want to be in that situation and whether I could do it or not, I'm not real sure.

Q Well, that's the reason why we spend the length of time with you now because, [2015] you know, we have to rely—everyone here has to rely on your service as a juror on what you tell us now. There will be times when I talk to, you, Ms. Boggess, where you're—you're going to answer questions probably in the same way I would and everyone else here would if we were in your shoes. I think so. Maybe. I don't know. You understand how important your answers are to everybody here. I don't want to make it sound like I'm putting any pressure on you, but the law does require that we kind of pin you down on some things, simply because the law requires it.

A I understand.

Q You see, if you say I think so, that means you may or you may not. Neither side can make a decision here and neither can the Judge on an answer like that, even though it's very human for you to answer that way. Do you see what I'm getting at?

A Yes.

Q One of the reasons I mention that ,is, in question fifty-eight it says here, "Do you have any moral, religious, or personal beliefs that would prevent you from returning a [2016] verdict which would ultimately result in the execution of another human being?" and you said, yes or you circles yes here. Could you talk a little bit about that?

A Well, I guess what I meant by that is, I do have difficulty—I've never been in a situation like this before, like I said. I believe that the bible states—and I am a Christian and I believe that the bible states that, if someone commits a crime or commits a sin or whatever you want to call it, there is a punishment and it is up to the people that love that

person, the Christians or whatever, to punish that person for that particular crime because God will punish him and I believe he puts us down here to do that same thing. That's what I meant, but now whether or not I could actually go through with murder—with killing another person or taking another person's life, I just don't know. I'd have trouble with that.

Q Okay. You're not the first person to have voiced that opinion. That's why this is as tedious as it is and takes as long as it does because actually nobody wishes to put you [2017] or anybody else, Ms. Boggess, on a jury or in a position to have to do something—let's say to follow their oath as a juror, if they accept that oath—that is going to violate their conscience or their personal feelings that they've held for a long time if that's the situation. Do you see what I'm getting at?

We're not trying to make somebody do something against their conscience. It's just that simple. Sure the law does expect you, as a citizen of this community, to serve on a jury if you can. The law does not expect you, me, these other lawyers or anybody else to serve on a jury or do anything in violation of. their conscience.

Now, there is a big difference, as we all know, between a decision that may be difficult because certainly on a death penalty case, it would be difficult for anybody, I suppose. I'm sure it's not going to bean easy decision for anybody. For some people and, in fact, a lot of people, it's more than just a difficult decision. It's a decision that would cause them, because of the enormity or the magnitude of the situation, you know, being a [2018] part of someone else being executed, they simply feel that would be a violation of their long-standing personal feelings and conscientious beliefs. Do you see what I'm getting at?

A Yes.

Q That's why the Judge told you that the oath the jurors take is an option. You have the opportunity, you or me or anybody, or the option of taking the oath or not taking the oath. It really is—I like the way the Judge put it. He said it was kind of like a job or a job description. When you go and you interview for a job, you find out what all is involved because you want to know what is going to be expected of you once you sign on. Obviously, you're not under any obligation to sign on ordinarily for a new job until—you know, you want to know what it entails and what it involves and what you're expected to do and then whether or not you can do it or you want to do it. Do you see?

Now, that is kind of like this situation. If you're on this jury, for example or anybody is on a jury, you know that the [2019] result of three yes answers to these questions, if the State proves to you or anybody that these three questions should be answered yes, this Judge, I guarantee you, will sentence this Defendant to die. The Judge has no option. I know that the Judge is not going to get mad at me when I say this, Ms. Boggess. He has really little to do with the decision as to life or death. In fact, he has virtually nothing to do except to carry out the will of the jury on the basis of those three answers. You see, three yes answers equals death. Although you don't write death in there like you used to, you might as well. Yes, yes, yes, equals death because the Judge can't change the verdict. Do you see what I'm getting at? If a person is on a jury that last yes equals death. Do you see what I'm getting at?

Now, that's part of the job description and ultimately it boils down to whether or not you feel like you could serve on this jury and participate in the execution of .another human being, that it was something that would both your personal conscience or your personal beliefs. If it doesn't, then you [2020] would probably be qualified to serve. If it does, then there is no requirement that you take the oath. Do you see what I'm getting at?

A Yes.

Q Now, let me back up for just a second. Maybe this might be helpful to us in discussing this. I hate to do this because it puts people in categories and I know it's hard to do sometimes and probably unfair,' but it serves a purpose, I think.

When it comes to death penalty juries and capital punishment, people may be divided into four categories. In no particular order. I'm sure you know, before I go any farther, that rather a person serves on this type of a jury or a person doesn't serve, that doesn't make you a good citizen or a bad citizen because, if it were that way, then we would have about thirty-nine people that were bad citizens. We have only two jurors. We've talked to forty people. Do you see what I'm getting at?

A Yes.

Q You understand that. You don't get any points for serving on this kind of a [2021] jury or any demerits if you don't.

The first category of individual let's say is a person who believes in the death penalty, they believe it is a deterrent to crime or it's necessary for whatever reasons and furthermore, if they had to, they could serve on this jury and they could render a decision that would result in Mr. Miller-El's death. It wouldn't violate their conscience.

The second group says, well, I believe in it and I think we probably need it or it serves some purpose, but because of my personal beliefs or my conscientious beliefs, my religious or my moral beliefs, I'm just not suited to serve on this kind of a jury. I could serve on a noncapital case, a burglary or a robbery or a murder that didn't involve the death penalty, but I'm just not suited for this type of a case.

Let's say there is a third category that say, I don't believe in it, the death penalty, but if it's the law, I guess my .feelings aren't that strong and I guess I could serve on it.

Or a fourth category that says, I [2022] don't believe in the death penalty and my feelings are so strong that I could never return a verdict that would result in anyone being executed. No way.

Now, I know these are general categories, but do you see yourself falling into one of those four?

A Yes.
Q Which one is that?
A I probably would pick the first one.
Q You do believe in the death penalty?
A Yes.
Q And you say you could serve on the jury?
A Yes.
Q Even though it meant that it might be a tough decision?
A Yes.
Q Even though it meant that, if you answered all three of those questions yes based on the evidence, you know it would result in the execution of this Defendant?
A Yes.
[2023] Q So whatever personal feelings, religious or moral, that you have, you would not have to compromise them; you could serve on the jury and go ahead and answer those questions?
A Yes.
Q Is there any doubt in your mind about that at all?
A I could always tell the truth.
Q That's all you're expected to do. We have to come forth with the evidence to satisfy. you beyond a reasonable doubt and, if we do, you answer the questions yes. If we don't, you answer the questions no. You know that the result

of one or more no answers is a life sentence and those are the three questions that the Judge talked about yesterday that decide life or death.

Now, let me just cover one thing with you. You understand that in the old days, under the old law, the jurors decided on a personal basis. If you heard a fact situation, ,you heard about a defendant and a crime that made you mad enough, I guess, or caused you to feel that way, you would actually vote for [2024] death or life, if you didn't feel that way, or some number of years. Do you see what I'm getting at? It's a very personal decision.

We know that being on a jury, even though you don't make that decision directly, instead you answer the questions, you know that the result is the same, don't you? It could be death or life depending upon the answers?

A Yes.
Q The law expects you to put aside your feelings, your personal feelings, one way or the other and not let them influence your decision. Am I making myself clear?
A Uh-huh.
Q We all know, however, that we're obviously not robots. If I were on a jury, I might have a personal feeling. I might say, well, after I heard the evidence, or you might say, I think this guy ought to die for what he did. I'm not talking about Mr. Miller-El. Let's just talk about an example. You know, you might say, for what he did, I think this guy ought to be boiled in oil, if it were up to me. In any case, I think he ought to die, but when it comes time to answering these three [2025] questions, let's say you look at them in all honesty and find out that we have not satisfied you that one or more of the questions should be' answered yes. In which case, you know, your oath as a juror would require you to answer the question no. Could you do that, go ahead and answer the question no

knowing that it would result in a life sentence and not the death sentence that you personally desire? Do you see what I'm getting at?

A Yeah. I could answer the questions on the basis of the truth, the facts that I felt like were the truth.

Q You see, the flip side of that coin, don't you?

A Yes.

Q Let's say you're on a jury and you say, well, this may be capital murder, but I don't think the guy—you know, if I could vote directly, I don't think the guy should die?

A Yes.

Q But I look at those questions and, yeah, they proved to me that he did it deliberately. Yeah, that's true. I can answer [2026] that yes. I think he probably would commit some criminal act of violence, so I can answer that one yes. And three, I believe it-was unprovoked. Do you see what I'm getting at? Three yes answers in that situation would equal death. Could you put aside your personal feelings for a life sentence and answer those three questions yes knowing that it would result in the execution of that Defendant which would be contrary to your personal desire?

A I still back and say, regardless of my feelings, I would hope that I would not judge him by how I felt personally, that I would judge him by what facts I heard.

Q That's what the law would expect.. Let's shift gears here for just a second and let's talk about a situation that I'm not saying would ever come up, but we have to .discuss it at this time. You 'know capital murder, the type of capital murder that we've alleged in this indictment, as the Judge referred to it and as we call it also, it's murder plus. We have the murder, the knowing or intentional killing of another human being, but no legal excuse or justification. It's [2027] couple with another very serious offense, another felony offense, murder during a robbery, for example, as alleged here. Okay. That's one type of capital murder.

I gather from what you told us, because that's what the law is, that's the type of capital murder you believe the death penalty could be called for depending on the facts and circumstances?

A Right.

Q The other type is murder during a burglary, murder during a rape, murder during arson or murder during a kidnapping, murder plus. Do you understand that murder itself is not a capital offense. But when you commit murder during a robbery, then it goes up to capital murder. Do you see what I'm getting at?

A Yes.

Q Now, let's say that you're on a jury. Just imagine for a second that you're on a capital murder jury. The State has alleged .murder during a burglary, a capital murder. We proved the murder. There's no doubt about it. You don't have any doubt that the Defendant [2028] killed somebody with no legal excuse and no justification for it under the law at all. It 3 was knowing and intentional, but you didn't hear any testimony about a burglary. Do you understand, if that were the situation, if that situation occurred, you could not convict that individual of capital murder for the very simple and obvious reason that we didn't prove capital murder. What did we prove?

A Just regular murder.

Q You got it. That's right. When you find him not guilty of capital murder because we didn't prove that and find him guilty of what we did prove, which was what? You said murder. Well, if that were to happen, you forget all about the automatic life o r death, you see. Those are no longer options for regular murder. The range of penalty for murder is very, very broad under the laws of the State of Texas.

I want to go back to what we were talking about earlier. That is where we're talking about the murder offense. You talk about the range of penalty for murder, not capital m

under, but regular murder, then you [2029] must exclude from your thinking a homicide, in other words a killing, where one person kills another person knowingly or intentionally, you must exclude what I said earlier, self-defense. When you think about murder and the range of penalty, high or low or somewhere in between, you must exclude self-defense because, as I said earlier, if you believe someone killed somebody in self-defense, they've got a right to do that. You have to find someone like that no guilty.

What I'm saying is, I don't want you to be thinking, well, I can give X number of years lower because someone killed in self-defense. If you think someone killed knowingly or intentionally in self-defense, you have to find them not guilty. The same thing would hold true if you thought it was an accident. That's not a lower penalty. That's not guilty. I mean, if the gun went off accidentally, you don't give someone a lower sentence. You find them not guilty.

If you believed someone was insane at the time that they knowingly or intentionally killed somebody, well, that's not [2030] murder either. You find them not guilty. Am I making myself clear?

A Yes.

Q Or if you found, for example, that somebody killed someone in the heat of sudden passion. For example, somebody comes home and finds out that their child had been sexually molested by a neighbor. The neighbor is up the street and he is laughing about it. 'The father flies off the handle, goes into a rage, picks up his gun, goes up the street and kills the neighbor. Well, the law doesn't excuse that, but it doesn't call it murder, either. It's less than murder. It's called voluntary manslaughter, so don't be thinking about that. That's not within the range of penalty. Am I making myself clear?

A Yeah.

Q Now, having set that stage—and I'm just asking you for your personal opinion, all right? If you believe one person

knew he was going to kill somebody, intended to kill, somebody and did it, no insanity, no accident, no self-defense and no heat of passion, what do you think the minimum ought to be, Ms. Boggess, [2031] for that sort of an offense, for that kind of murder, a knowing and intentional murder?

A I don't have any problem with what I think. It's what I believe and I believe that the bible says that person should be put to death. That's in Romans and that's my belief. Whether I want to be the one to decide that is—

Q In other words, in your personal feelings it should be death for knowing and intentional murder; is that correct?

A Right.

Q Let me ask you, ma'am, in that regard, knowing that the range of penalty is from five years to ninety-nine years or life for murder—that's what the law sets out—could you ever—would you ever feel it was proper—could you ever hear any facts or circumstances where you personally would feel it would be proper to assess a sentence as low as five years.for a knowing and intentional murder—

MR. CUNNINGHAM: Your Honor, she—go ahead.

Q I think I'm finished.

[2032] MR. CUNNINGHAM: Your Honor, we would object to the f o rm of the question because it fails to include if she heard the facts and circumstances of that case and she believed that the facts and circumstances called for five years.

THE COURT: Go ahead and ask the question.

MR. CUNNINGHAM: And, Your Honor, I think she should be told what the range of punishment is.

MR. MACALUSO: I think I just did, Your Honor. If I'm not mistaken I did say it was five years to ninety-nine years or life, didn't I?

Q That's what the 1:aw says, that the range of penalty for murder is five years to ninety-nine years or life. The law

expects a juror, if he can to tailor the punishment somewhere in between there. Let me just as you, do you personally feel—you know, that's why you're here. we're asking you.

[2033] A Let me explain something.

Q Sure.

A You know, my feelings about the law and my feelings about what the bible says about what the law does. I feel that, you know, the bible says that I should be under the government, the rule of the government. However, it says also to me that the rule of the government should be a biblical rule and if the rules of government are not biblical, then I'm not supposed to follow that, but follow my own beliefs biblically. I'm having difficulty with the fact that what the law decides is not biblical principle, but yet I'm still under the law. Not that I'm going to break the law, but I don't want to be. a part of that particular—I don't want to go with the law just because it's the law, just because you say he should get five to ninety-nine or he 'should get death, because of this or the other, when the bible says, no, that's not the way I want it. Do you understand what I'm saying?

Q I think I understand what you're saying. You said personally you would vote for death. You think a person ought to receive the [2034] death penalty for that; is that correct?

A I'm saying that my personal beliefs, because I'm a Christian, says that, if someone commits a murder, then that's what the bible says. Whether or not the law says it, you know, is something different because—you've decided what you're going to do. You know what I'm saying? The law has decided, now I'm supposed to follow the law, but only if the law states what is biblically right.

Q That's why we're going through and asking you all these questions. I'm out of time right now. The Judge has very graciously allotted us a specific amount of time, but I just want to ask you this last question. It's kind of a difficult question to ask.

Knowing yourself and knowing how you feel in your heart and in your mind and spiritually, for that matter, do you feel, ma'am, that there would ever be any facts and circumstances where you feel it would ever be proper or justified, that you could ever under any facts and circumstances, feel that a five year sentence, you could ever consider and actually vote for a sentence as low as five [2035] years, for the knowing and intentional taking of another human life without any legal excuse or any legal justification whatsoever? Do you :ever feel it would be proper under any circumstances to vote for that sort of a low sentence?

A That's tough. I may—

Q You know, we have to pin you down on that. I know you haven't heard any facts. We can only go as far as we have. You've just got to search your heart and your mind. Just tell us how you feel. Do you feel you could ever—you would ever feel it proper under any facts and circumstances where you would be able to vote for as low as five years in the Texas Department of Corrections where one person knowingly and intentionally killed somebody, commits murder, without any legal excuse or any legal justification whatsoever regardless of the facts?

A I'd have to say yeah. I'd have to say that I may do that. It just depends on where my heart was and how my faith—and what I had prayed about and how God had answered my prayers. You know, even though He says death [2036] sentence for everything, the Lord does do different things at different times. He doesn't always kill everybody just because someone else kills them, so I couldn't say that.

Q Again, I regret this, but I'm going to have to pin you down at this point. It's either yes, you feel you could or you could not.

A I feel I could.

Q Do you have any questions at all of me, Ms. Boggess?

A No.

Q Do you know of any reason, whether we've touched on it or not, why you could not be a fair and impartial juror in this case?

A I don't think I could ever not be fair or impartial. I don't think I could ever not be fair and impartial, but I wouldn't want to serve on it, though, but that's my true feeling.

Q You've been very polite, ma'am, .and very kind to us and very attentive and I appreciate it.

MR. MACALUSO: Your Honor, [2037] I'll pass the prospective juror.

THE COURT: Thank you, Mr. Macaluso. You have five extra minutes if you need it.

[2038] EXAMINATION

BY MR. CUNNINGHAM:

Q How do you pronounce your last name, please?

A Boggess.

Q Ms. Boggess, my name-is Cunningham and to my immediate left is Mr. West. As Mr. Macaluso indicated to you, we have been appointed to represent Mr. Miller-El in this case. Just briefly I would like to ask you a few questions because I think you have answered their questions and based upon the law, you're qualified as a juror in this case.

On your information sheet for religious preference or your church, OCB, is that E or F?

A F, Oak Cliff Bible Fellowship.

Q Where is that located?

A It's on Camp Wisdom in Dallas.

Q I've been trying to figure in my mind where your husband works in the district clerk's office. Is his hair sort of salt and .peppered?

A Yes. He is crippled.

Q Oh, he works in the back. I've [2039] known him a long time. This is for the purpose of the record. What is your race?

A Black.

Q She's taking down everything you say and unless we ask you, it's not in the record. Do you teach Sunday school?

A Yes.

Q You're a member of the Visiting Nurses Association?

A Right. I'm a therapist.

Q Do you know Etta Bernice Johnson?

A Uh-huh.

Q How long have you known Etta?

A I don't know her personally. I just know her name.

Q She is also a member of your association?

A Yes.

Q You live at 5717 Fox Hill Lane?

A Right.

Q How long have you and your husband and children lived there?

A Almost eight years.

Q Are you and your husband buying your home there?

[2040] A Yes.

Q Two of them attend public school?

A Yes.

Q Is it public or private?

A Public.

Q Where does Ke'Andra go to school?

A Atwell Junior High.

Q And your son goes to school where?

A Turner. All three of those are boys.

Q Have you taken any other courses above your BS degree?

A No.

Q You don't remember what security agency your husband used to work for?

A I think it was Preston or something like that. I don't know if they're still in business.

Q What did he do for them?

A He rode the Surtran buses and monitored the bus drivers.

Q You've never had any criminal jury service?

A. No.

Q How many times have you been [2041]called down?

A I don't know. I've only served once.

Q At least one time you served on a civil and while—or you took a recess and they settled it?

A Yes.

Q Ms. Boggess, you understand that in a criminal case, the State of Texas has the burden of proof in a case. That's these gentlemen over here?

A Uh-huh.

Q If you were chosen as a juror in this case would you hold them to their burden of proof?

A I beg your pardon?

Q The burden of proof is on the State to prove its case beyond a reasonable doubt. The law says that, if they do not prove their case beyond a reasonable doubt, the jury should find the accused not guilty. My question to you is, if they failed to prove their case beyond a reasonable doubt, would you have any problem with finding the accused not guilty?

[2042] A No, not if they didn't prove it.

Q In other words, if they don't prove it, guilty. That's what the law expects and you that?

A Yes.

Q I'm not confusing you, am I?

A No.

MR. CUNNINGHAM: Pass the juror, Your Honor.

MR. MACALUSO: The State will exercise a preemptory challenge, Your Honor.

THE COURT: Okay. Ms. Boggess, you'll be excused from service in this case.. We appreciate your attention down here today and your patience with us and tell Joe hello for me, would you? He's been a witness up here a few times. Have a good day.

(Whereupon, Ms. Boggess left the courtroom, after which the following proceedings [2043] were held.)

THE COURT: Go ahead, Mr. Nelson.

MR. NELSON: The State would like to put in the record at this time the following reasons for exercising our preemptory strike for Ms. Boggess: Number one, she stated that she wasn't sure she could actually give death and, as a matter of fact, because-of the big decision in this case, she did not want to serve on this jury. It is my understanding that the Court is also placing the questionnaires in the Court's records. I would like to call the attention of the Court to where Ms. Boggess said she was a defense witness for her nephew who was evidently charged with stealing at one time. It is for those reasons that we chose to exercise our preemptory strike on this juror.

MR. CUNNINGHAM: Ordinarily, [2044] Your Honor, I probably would not say anything, but since the State is putting into the record that alleged reason for striking Ms. Boggess, I would point out to the Court that of the five blacks that have qualified all five have been struck, by the State, those being; Roger R. Bozeman, number seven; Billy J. Fields, number nine; Hilbert Gitchaway, number seventeen; Virginia R. Smith, number nineteen; Joe A. Warren, number twenty-eight and now Ms. Carrol Boggess, who they just struck.

THE COURT: She was number forty?

MR. CUNNINGHAM: Number forty. Joe A. Warren is number twenty-eight.

THE COURT: Let me tell you what my records show.

MR. CUNNINGHAM: Did I say Virginia Smith—Bozeman, Fields, [2045] Gitchaway—no. Gitchaway was by agreement. I'm sorry.

Bozeman, Fields, Warren, Rand and Boggess.

THE COURT: Let me make sure that the record is clear. I show that Mr. Bozeman

MR. CUNNINGHAM: Was their first strike.

THE COURT: I think that's probably correct. We've had several blacks either excused by agreement or for cause. Let me clarify something because I do remember now that we agreed or it should be clear that we're going to put into the-Court's file any questionnaires of any the State's strikes because I can go back and get them in there. I don't know if I've got all of them in there right now or not.

REPORTER: I have them.

THE COURT: Mr. Cunningham, to make sure that the record is in [2046] the shape that you-all want it for any reason, will you make sure at some point after voir dire that Ms. Bardwell has the questionnaires of all the jurors that you want in there? I' sticking some in the file as we go, but I prefer to let the court reporter keep track of that, if you-all wouldn't mind.

Let's bring in the next juror.

(Whereupon, these proceedings are continued in Volume V.)

* * * *

[2170] WAYMAN A. KENNEDY,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth And nothing but .the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Mr. Kennedy. I want to start out by reintroducing everybody who is sitting here. You met almost all of us yesterday. My name is Jim Nelson. The gentleman seated next to me is Mr. Paul Macaluso and the gentleman seated behind me here is Mr. Norman Kinne. The three of us are assistant district attorneys here in Dallas and we've been assigned by Henry Wade, your elected district attorney, to handle this case for the State of Texas.

The man immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Kennedy?

Q Next to him is Mr. Royce West.

MR. WEST: Good afternoon, Mr. Kennedy.

[2171] Q These two gentlemen have been appointed by Judge McDowell to handle the defense of Thomas Joe Miller-E1. He's the man down at the far end of the counsel table. I think you can see him if you lean forward there.

As you know from yesterday Mr. Miller-E1 is indicted and charged with the offense of capital murder. That's the most serious criminal offense anyone can be charged with in the State of Texas. Now, Mr. Kennedy, I don't believe from looking at your sheet that you've been on jury- service before; is that right?

A That's correct, I haven't.

Q Now, if you remember yesterday we were in here and you were in a group of about forty people out there. On most normal cases you would have remained in the group like that for us to talk with you. we would have asked you some questions out there and pointed some things out to you in front of the group. Because this is a death penalty case and it

is penalty a situation where people have very strong feelings on both sides of some of these issues [2172] that we're going to talk about, the law allows us to talk to you individually like we're doing here. I think the hope is that, if you're in here by yourself, you will be able to to be a little more comfortable and a little more open with how you feel about things than you would be if you had to talk in front of forty or fifty other people who are sitting out there.

What I would like you to do is the same thing the Judge told you to do and that is relax just as much as you can. Remember that there are no right or wrong answers to anything I'm going to ask you or these gentlemen may ask you. We're just trying to find out how you feel about some things.

Now, Mr. Kennedy, we've talk to—you're the forty-second person o rforty-third person we've talked to in one way or another on this jury. At this time we have three jurors. You can see that it is a rather tedious process, number one, and the great majority of the people, for one reason or another, have not been suited to serve on this particular jury. We're going to talk to you about some things that you may or may not have some strong [2173] feelings about and I hope when you do have, you will express those. I hope, if I talk too fast or say something that isn't clear or you have questions, I hope you will stop me, so we can get those cleared up while we're talking here today. I want to be sure we're understanding each other on what we're talking about.

A All right.

Q If you will bear with me, here we got. Now, Mr. Kennedy, I feel like it is only fair that you know from the outset what the position of the State of Texas and our office is in this case. We are actively seeking the death penalty for that man sitting right down there, Thomas Joe Miller-El. We feel like we will be able to present twelve jurors, to you if you're on that jury, the type and quantity of evidence to convince a

jury to find Mr. Miller-El guilty beyond a reasonable doubt of capital murder. We further anticipate that we can present sufficient type and quantity of evidence to have a jury answer those three questions that you see on the boards yes.

If those three questions are answered yes, each one is answered yes, it [2174] results in the death penalty as a matter of law. There is no option. The Judge doesn't have an option to do anything different. Three yes answers equals the death penalty. We anticipate—

A – The jury is the one, if they answer the questions correctly, the Judge cannot change it?

Q That's correct. The Judge has no option whatsoever. If the jury comes back and answers each of those questions yes, yes, yes, Judge McDowell has to, under the law, and is required to assess a death sentence for Thomas Joe Miller-El. If one of those questions is answered no, then a life sentence is assessed. The Judge has no option whatsoever in either case. We anticipate, Mr. Kennedy—being very open and honest about it—if those three questions are answered yes, at some point Thomas Joe Miller-E1 will be taken to Huntsville, Texas. He will be placed on death row and at some time will be taken to the death house where he will be strapped on a gurney, an IV put into his arm and he will be injected with a substance that will cause his death and [2175] his life as the result of the verdict in this case if those three questions are answered yes.

I feel like it is only fair to you that we're clear about it and you know where we're coming from on this thing and that's why I tell you that so you know what you're dealing with because I would guess coming in yesterday most people feel, well, maybe I'll get on a civil case or I'll be on a little theft case or something like that.

A Yes. That's the normal feeling.

Q And then you walk in and you get hit with a capital murder, I would guess it's a little bit of a surprise, a little bit of a shock?

A Yes.

Q You did have a chance yesterday to fill out a questionnaire. I know everybody was in and out of the courtroom and back and forth and in. the hall and back in the courtroom and so o-n, so you didn't really have a whole lot of time to sit down and concentrate on answering the questionnaire, but there was one question on there about the death penalty. You answered it, but you've had a chance to sleep in it a [2176] little bit, to give it some more thought, I would guess, since then. Would you just tell us in your own words, if you would, how you feel about the death penalty and whether it serves a purpose in our society today?

A Well, my feelings are kind of like what I said on the questionnaire, that I really don't believe in it only in extreme cases and I would say like a mass murder. Someone broke into this courtroom and killed all of us, I would say yeah, put him to death because that would be a mass murder type situation or in a situation where it was a mutilation, where they come in and cut the body all up or something like that. Normally I wouldn't say on just the average murder case—I would say no, not the death sentence.

Q Okay. Well, let me just take a couple of minutes to explain a little bit about the Texas law with relation to the death penalty. The death penalty is an option in Texas only, in cases of what we call capital murder. That's murder, number one, but murder in a special situation. For example, if a certain class of persons is killed, murder of a [2177] police officer or a fireman on duty, a prison guard, something like that, or a murder for hire fits in there. Second is one that you mention, a mass murder like the incident' we had here a, year or two ago. The third one is what we're dealing with here, Mr. Kennedy, and is something we call murder plus, for lack of a better name, I guess.

We have to prove, number one, that the individual committed the offense of murder but that he did that while in the course of committing or attempting to commit another offense, burglary or robbery or rape or arson, for example. Specifically in this case we're talking about murder in the course of a robbery. Now, the law in the State of Texas says that the death penalty is appropriate in those cases. It can be considered in those cases.

I guess what I would like to know from you, first off, Mr. Kennedy, based on what you just told me, do you feel like the death penalty should be appropriate in cases like that or are those not serious enough?

A The circumstances around it, or [2178] are you saying a small—you know, what type of robbery was it? Was it a small robbery like where he held up somebody in a back alley or something and shoot them because they won't give him their money or are you talking about like a bank holdup where you shoot an armed guard or what?

Q I'm not allowed, Mr. Kennedy, under the law, to go into any of the facts of this case. None of the lawyers can and the Judge can't at this point.

A So that is the kind of thing that would weigh my decision as to why a person should be put to death for shooting someone during a robbery. To me, it would like, if it was just a normal robbery, why wouldn't a life sentence be enough and make sure that person never comes up for parole.

Q I'm sorry. I didn't hear what you said.

A I said like a life sentence where they wouldn't never come up for parole. If the crime was severe enough—well, I have a question and a statement. Some people are put into prison with never coming up for parole, [2179] right, and some life sentences still come up for parole in like twenty years or something like that, right?

Q I can't go into the parole laws or anything having to do with that.

A That's what I'm saying. My opinion would be just like lock them up and he would be without ever coming up for parole. It would be a life term sentence.

Q Let me go just a little bit farther and see—I can't go into the facts of the case, but let me go a little bit farther and see where we wind up. If a person is convicted of capital murder—and we've alleged basically this in the indictment, Mr. Kennedy; That this Defendant did knowingly or intentionally cause the death of another individual and that he did it while in the course of committing or attempting to commit robbery—That's not word for word, but it-'s basically what the indictment says. If you as a juror or if the jury convicts a man of this offense, capital murder, there are two possible punishments under the law, life—and that life sentence is subject to the same rules and [2180] regulations and considerations and restrictions as any other life sentence in the State of Texas, all the same, or a death sentence. Those are the two options. If he is convicted of capital murder, it goes to only those two options. That's what we're dealing with. That's about as far as I can go without going into the facts.

The law in the State of Texas says the death. penalty is appropriate for consideration in this type of case. In order for a person to be qualified to serve as a juror, they have to be able to understand that and not have such problems with it that it would affect their deliberations in the case.

Now, what is going to happen in the procedure basically is this: This trial is what we call a bifurcated trial. There are two stages. First of all, there "is the guilt, or innocence phase of the trial. It's at that point that we have to prove to you, number one, that the Defendant committed the murder and we have to go further to prove that he committed that while in the course of committing a robbery or attempting to commit a robbery. Am [2181] I clear with you so far?

A Yes.

Q If we prove that to you beyond a reasonable doubt, the it is your duty as jurors and as a jury to find the Defendant guilty of capital murder. If we fail to prove that to you beyond a reasonable doubt, it is your duty to find him not guilty or, if we prove some lesser offense, to find him guilty of that depending on what the facts show.

A That's understandable.

Q Assuming that he is convicted of capital murder, then we move to the second phase of the trial, that being what we call the punishment phase of the trial. Now, under the old law, up until about twelve or thirteen years ago or something like that, the jury on a capital murder case listened to the evidence and went out into the jury room, took the verdict form and they put life or death and it. That was the verdict. Again, the Judge had no discretion. If the jury said life, he got that life sentence. If they said death, he got the death sentence.

[2182] Today the legislature has done things a little bit differently. They have set out three questions that must be answered. After hearing all of the evidence, you as a jury, if you're on that jury, will be asked to answer those questions either yes or no. Why don't you take just a minute to look at those questions and read them over?

A (Juror complies.) Are the blanks left for the name?

Q Those will be names, yes, sir. Have you had a chance to read those over?

A Yes, sir.

Q Now, I don't know why the legislature in their wisdom set up the questions rather than just asking the jury to write life or death. The thing I want you to understand, Mr. Kennedy, if the effect is the same. If the jury answers those three questions yes, he gets the death penalty, period, end of story. That's it. We anticipate, if those three questions are answered yes, at some point this man sitting right down here will have his life taken by the State of Texas. If one of those

questions is [2183] answered no, he gets a life sentence. Again, there is no option. It's that same life sentence that we talked about.

Now, you've indicated that you have a real question whether you feel the death penalty is appropriate in this type of case, a murder plus a robbery.

MR. CUNNINGHAM: Your Honor, we'll object to that statement. That is an improper statement of what this prospective juror has said.

THE COURT: I'll overrule that. I think Mr. Kennedy understand the question. Mr. Kennedy, let me tell you, if you don't understand any question the lawyers ask or want it clarified, please let us know. I'm counting on you to do that. Go ahead.

A Repeat the question again.

Q Okay. Mr. Kennedy, first of all, let me say one thing. There is no way I want to or would try to put any words in your mouth or argue with you or force you to say anything [2184] that isn't what you feel or what you believe. So if I misstate something or if I say something you don't agree with, I hope you will tell me. I think you're strong enough that you if I say something wrong.

A I Will.

Q Okay. I thought you told me that you had some questions or some reservations about the death penalty being appropriate in this type of case; is that right?

A That's right.

Q Okay. First of all, let me tell you this: I think I told you that we've talked to about forty-two or forty-three people or something like that and we only have three jurors at this point. The people that we have excused or the-people who aren't suited to serve on this jury aren't bad people. If you sit on the jury, you don't get brownie points and if you don't sit, you don't get any demerits as far as citizenship or anything

like that. It's a difficult case. There are going to be difficult decisions to be made and what we're looking for is twelve people who can follow the law and make those decisions. If [2185] somebody can't do that or would have problems doing that, then we don't want to force them to sit on the jury.

A This, I understand. I can understand that because what you're saying is, you don't want somebody who has already formulated an opinion before the trial even starts.

Q Exactly.

A That's just like what I was telling you. The reason my thoughts are different for the death penalty versus a life sentence may be because I haven't heard the evidence on it. That's the reason I said that mine are different on the situation, the way I look at it, the way I would feel.

MR. WEST: Mr. Kennedy, would you speak into the microphone. I can barely hear you.

A As I was saying, it would have to be like the circumstances—I would have to see—you know, before I form a complete conclusion as to what because I don't about people, but myself, before I would say I would [2186] go along with the death sentence in some cases and some cases not, as I stated briefly on that, mass murder or something, yes. It also depends on how much—someone else in another situation might give a life sentence. That's the only thing that I'm saying.

Q You're right, Mr. Kennedy. We want twelve people that have an open mind sitting over there. We don't want, and we're not going to have, twelve people over there frothing at the mouth and jumping up and down to execute somebody. That's not what we're going to have on this jury. By the same token, we need twelve people who can realize that they're going to make a decision with reference to these questions and can make those decisions without being affected by their personal feelings about whether the law is correct or not or their—if they don't feel that the death penalty is appropriate

in this type of case, then they have trouble, a person would have trouble answering those questions one way or the other. We want twelve people who can answer those questions and make those decisions and handle that without reservations. Whether [2187] the questions are answered yes or no, they can make that decision.

I know you're in a difficult position because we can't tell you what the facts are and we aren't allowed to because you have to hear them from the witness stand.

A I can understand that.

Q If I told them, Mr. Cunningham or Mr. West probably would tell them a different way and none of that is evidence. The evidence comes from up there, so we can't even go into an example of what some facts might be. Understanding that we're dealing with murder in the course of a robbery of one individual, an individual by the name of Douglas Walker in this particular case', but one individual, he's killed while in the course of committing a robbery, is, in your mind, the death penalty appropriate for that type of case, understanding that you don't know the fact's of this case, but for this type of case, the death of one person during a robbery?

A There again, you're asking me something—it's kind of hard to say because one thing, you would have to formulate an [2188] opinion and my opinion would be—for one thing, I don't know all the facts. I guess what the law is saying—the state law says that it is okay to do it because you said that the state law says that a person can be pit to death for doing it, so are you saying what are my feelings of the law or what?

Q I want to know—we know what the law is. I want to know how you feel, what your personal feelings are.

A To me, it would depend on the circumstances.

Q Okay. We don't want to force someone, Mr. Kennedy, to take an action or to enforce a law that they have strong feelings against or that they don't agree with.

A As I stated earlier, if the circumstances around the situation were presented the way that I feel would warrant the death sentence, I would say yeah, but it also depends on the circumstances.. I would have to see more to say yes because I do have reservations about it.

Q You looked at those questions a few moments ago and read over them. [2189] Understanding that a yes answer to each of those questions results in a death sentence—

A Because you said—I know deliberately—and just picking something out of each one—you think they would commit another crime—I would say yeah because that person, if they was committed to a life sentence, you're not going to let them go back out into society, anyway, again, so the death sentence probably would be okay.

.REPORTER: I didn't get that last remark.

A I said the death sentence probably would be okay because, if you're going to put a person away forever and if the crime was bad enough, then I would say yes, the death sentence would be all right.

Q Let me go a little bit farther and ask this: I told you that the legislature put. those questions in rather than just have the jury write life or death. If you were on the jury and you, after hearing all the facts, felt that this man did not deserve the death penalty, those were your personal feelings, and nevertheless we have proved to you that a yes [2190] answer should be given to each of those three questions, could you give a yes answer to each of those three questions knowing it would result in the death sentence even though your personal feelings were that the man should get a life sentence?

A I don't know. It would depend on the evidence.

Q We have to prove to you that those questions should be answered yes and that burden of proof is here on this table and stays here. We have to prove it to you, but assuming we proved to you that the answer to those questions should be

yes, even if your personal feelings are such—you know how when you hear about something or you see something or you listen to something, you tend to get personal feelings, well, this ought to happen, an emotional or gut reaction type feeling. If your gut reaction and your emotional feeling is that the man deserves a life sentence and should not be executed, but nevertheless we prove to you that the answers to those questions should be yes, could you and would you answer them yes knowing it would result in [2191] the death sentence even though that's contrary to your emotional or gut reaction?

A Yeah, if it was proved, like I say, without a doubt. You have got to prove it without a doubt.

Q Now you said "without a doubt."

A What I mean is, the evidence has got to be convincing enough.

Q Beyond a reasonable doubt?

A Yes.

Q On TV you hear beyond a doubt—

A That's right, but that's basically what I'm saying. The evidence or whatever you would present would have to be convincing enough.

Q If we convinced you beyond a reasonable doubt, you could answer those questions yes? Even if you didn't personally or emotionally want to give him the death penalty, you could answer those questions yes?

A Yeah—you said personally?

Q Right.

A Yes.

Q In other words, your personal and emotional reaction is this guy does not deserve [2192] the death penalty. He deserves a life sentence not the death sentence. We proved to you that those questions should be answered yes, could you answer them yes?

A It's kind of a contradicting statement. You're saying would my convictions that I believe that it should be a life sentence, but then you say you proved to me that—could I

state the death sentence and answer those questions yes. Those are kind of contradicting statements.

Q They sure are, but that's why the questions are there. The legislature—I don't know what their reason—maybe they wanted to put a buffer in there between a person's emotions and the actual verdict. What the legislature has said is that those questions should be answered based on the proof. What I need to know from you, Mr. Kennedy, is, if those questions are proved, a yes answer to those questions is proved, could you answer them yes even if you personally felt that the man should get a life sentence rather than the death sentence? You know, if you were just going to write on the verdict form life or [2193] death, you would write life?

A Uh-huh.

Q But we have proved that each of those should be answered yes. Could you nevertheless answer them yes?

A Yes, I believe so.

Q You think you could?

A I think I could if it was proven.

Q We have to prove it to you.

A It's got to be proven.

Q Okay. Now, when we're talking about proof, one other thing that may come up in this case—we don't anticipate that it will, but it may. You remember I told you that we call this a murder plus. For simple murder in the State of Texas, the death penalty is not appropriate under the law. It's not a consideration. If we prove to you that the person knowingly or intentionally caused the death of another human being, the death penalty is not appropriate. It's a different situation.

We talked about murder and there is no first degree, second degree or third degree murder in Texas. It's just murder. [2194] What that is, is knowingly or intentionally causing the death of another individual. We aren't talking about self-defense. If it was self-defense, the person would be not guilty. If it was an accident, the person would be not guilty. If it's a

killing in the heat of passion—for example, you have some children and I have a little four year old girl. If I came home and found out somebody had raped my little four year old girl and the guy that did it is standing down the street laughing about it, I might very well take a gun and go down there and do a little justice of my own in that situation.

A I can understand that.

Q A killing in the heat of passion, that's not murder. When we talk about murder in the State of Texas, we aren't talking about insanity. If a person is insane, they're not guilty. We're talking about the knowing or intentional taking of another human life without any legal justification or excuse whatsoever. The guy knew he was going to do it and he intended to do it and did it without any legal justification or excuse whatsoever.

[2195] Now, the maximum sentence for something like that is life under the law. Can you give me an idea of just your personal feelings what you feel a minimum sentence should be for the offense of murder the way I've set it out for you?

A Well, to me that's almost like it's premeditated. But you said they don't have a premeditated statute here in Texas.

Q It's either murder, knowing or intentional taking of a human life or it's not murder.

A A person just plans to go out and shoot someone, you know, like I go out and shoot the first person I see or I shoot the first black or white or something like that, you go out and shoot someone like that, that person, I'd say, the minimum would be life because they shouldn't even be in society.

Q Okay. I'm not quite sure how' to go from here,, but murder can come up in a variety of situations. You would agree with me on that?

A Yes.

Q Again, we're not talking about [2196] self-defense or accident or insanity or killing in the heat of passion or anything like that. We're talking about the knowing—

A I know you said the minimum. The minimum amount that I would say would be at least twenty years.

Q For the taking of another human life?

A Yes.

Q Without any legal justification or excuse?

A At least twenty years with no parole.

Q And no parole in it?

A Right.

Q Okay. Mr. Kennedy, could you—again, for the knowing in intentional taking of another human life without any legal justification or excuse,, no matter what the facts and circumstances were—again, we're not talking about self-defense or accident or killing in the heat of passion. We're talking . about murder. Could you under any set of circumstances, no matter what the facts and circumstances were, ever assess, actually give, [2197] a five year sentence?

MR. WEST: Your Honor, I would ask that sentence be completed, if he felt as though a sentence of five years would, in fact, be warranted, if he felt in his mind that it would be warranted.

MR. CUNNINGHAM: Your Honor, we would also further object that the State has not advised Mr. Kennedy that the statute in Texas provides that the minimum punishment is not less than five or more than ninety-nine or life. I think it is an unfair question to this prospective juror to ask him about a five year sentence and not tell him that the statute says he can give five years.

THE COURT: I think his question included that five year. minimum, but reask the question, Mr. Nelson.

Q Mr. Kennedy, basically what I'm [2198] asking is, I want to know your personal feelings. We've talked about, through this whole thing, your personal feelings. That's what we're interested in. Could you—and I'm not going to go back through the whole thing again—for the knowing and inten-

tional taking of another human life without any legal justification or excuse, under any facts and circumstance no matter what they were, give, assess—if the law allowed you to give five years and it -was proper to give five years, could you ever give five years?

A Here again, like I say, it depends on the circumstances. I know I probably wouldn't, no. Right off my head I would say no.

Q Okay. No matter what the facts and circumstances showed?

A You know, you're saying just straight out and out, yeah, but if it was something different like where he had maybe—you know, in the heat of passion or self-defense or something. If it wasn't that at all, it was just an out cold-blood murder, then no. I would say at least twenty years.

[2199] Q Again, if it's the heat of passion, it's not murder. That's what we call voluntary manslaughter.

A Okay, but that's still going to carry some time with it, isn't it

Q Sometimes, but we're not even talking about that. We're talking about something more than that. We're talking about murder. We aren't talking about self-defense. We aren't talking about accident. We aren't talking about the heat of passion. We're talking about murder, knowingly or intentionally taking another human life. You're telling me that you would give twenty years and could not give five years; is that correct?

A Right.

Q I'm not misstating that, am I?

A No. Like it's cold-blooded murder, I would say at least twenty years—

Q Obviously you feel like human life is valuable and human life is precious?

A Yes.

Q That's the minimum value you would put on a human life; is that fair?

[2200] A That seems fair enough because the way I feel like, anyone take another person's life and it's not self-defense and it's just cold-blooded murder, then that person should at least be removed from society and at least take away twenty years of their life by taking them out of society.

Q Okay. Twenty whole years?

A Yes.

Q You made the comment earlier, no parole, but twenty years?

A Right.

Q Twenty calendar years—

MR. WEST: Your Honor, I'm going to object at this time. The Court has called time and Mr. Nelson is continuing to ask questions.

THE COURT: Well, I've given both sides a little leeway. Mr. Nelson, your time is to a close, so bring it to a close.

Q Mr. Kennedy, my time is over and I appreciate the Judge being generous with me and letting me talk to you for just a couple more [2201] minutes, but I feel -- I've tried to explain this as best I can. Do you feel like you understand what we've been talking about here?

A Yes.

Q I take it from what you've said, this is something you feel strongly about, is that right, and I could sit here and argue with you and argue with you and I'm not going to change your mind; is that --

A That's right.

Q I don't want to do that.

A I didn't think that you were trying to.

Q I'm just trying to find out how you feel and I don't think any of us here has a right to argue with you about how you feel. None of us is doing that and none of us is going to do that. I wanted to be sure that we're clear and you've told me that you feel like we're clear and understand what we've been talking about.. I appreciate very much your time and I

appreciate your patience with me in talking with me and being forthright and honest in your answers. I believe we wouldn't change your mind and I don't have any reason to think [2202] that you will. I'm not going to bother you any more. Mr. Kennedy, I thank you very much for our patience with me.

MR. NELSON: Your Honor, I'll pass the potential juror

[2203] EXAMINATION

BY MR. WEST:

Q Mr. Kennedy, as Mr. Nelson said, my. name is Royce West. I need to talk with you a little bit to make sure that you really understand what's going on.

Now, how many times have you been called down to serve on a jury?

A This is my second time.

Q You didn't serve the first time?

A No. The first time, when I came down, we were called up like we were yesterday, but the trial settled out of court, so they told us at that time, as far as they were concerned, we had served.

Q And you went on back home?

A Right.

Q Now, let me explain something to you. Mr. Nelson told you at the beginning that you're the forty-third person that we have talked to. Now, in a capital murder case each side has fifteen strikes that they can use for any purpose that they want to. When I say strike, I'm not talking about physical strikes. They can say, no, I don't want this person. [2204] They can do that fifteen times. Now, they can say I don't want this person and they don't even have to give a reason, if they don't like the way they part their hair, if they don't like the color shirt they have on, the color of their suit.

Now, both the State and the defense have that option. Some of those strikes have, in fact, been used in this particular case. In fact, the State has used eight and the defense has used six, so that's fourteen strikes that have been used for some purpose or another. Do you understand what I'm saying?

A Uh-huh.

Q Okay. Now, the only issue that we really need to address—and no one is asking you to make a decision until you hear the facts of the case. The law requires that, in order for you to be qualified to sit on this jury, you have an open mind. From listening to your responses, I believe that's what you're saying, that you would have an open mind; is that correct?

A Yes.

[2205] Q Now, sir, would it be a fair statement to say that, if you took the oath and the oath being that you would a true verdict render based on the law and the evidence -- would you do that?

A Yes. Well, the evidence and the law, but the evidence being the main thing.

Q The evidence being the main thing?

A Yeah.

Q But you've got to stay within the confines of the law, too?

A Well, yes.

Q The Judge says that it's a theft case, for example, that a person commits the offense of theft where he knowingly and intentionally takes someone else's property without their consent, in order to find that person guilty you would have to listen to the evidence and make a determination as to whether or not you believed the evidence and if you believed the. evidence, you could follow that oath; is that correct?

A Yes.

Q If you didn't believe it, you could say that the person is not guilty?

[2206] A Right.

Q Okay. The same thing applies to punishment. Now, Mr. Nelson asked you initially what's the minimum that you could give a person for first degree murder, knowingly and intentionally taking someone's life without any legal justification or excuse. I believe that your response, sir, was twenty years?

A Yes.

Q At that time you did not know what the range of unishment was that the law provides, did you?

A No, I didn't.

Q Now, understand that the legislature, the people that we elect down in Austin, have set that range of punishment and that range of punishment has been in effect ever since I've been a lawyer and I've been a lawyer for some six years. Now, obviously if the range of punishment is from five years to ninety-nine year or life, there is a reason that they did it and that's because there is a broad range of facts and circumstances that would necessitate a minimum of five years [2207] all the way up to life and an optional fine of $10,000.00. Would you agree with that?

A Yes.

Q Now, the law says that, if you hear evidence that you feel as though warrants the maximum of life, in order to be qualified as a juror, you have to tell the State that, if I hear those facts and circumstances and I feel as though it's proper in my heart, I feel as though it is proper, I can give that person the maximum of life. Can you do that?

A Yes.

Q The law also says that you have to be able to tell the defense that, if you hear the facts and circumstances and you feel as though it's proper in your heart, you would be able to consider and, under the proper facts and circumstances, give the minimum of five years. Can you do that?

A Now, saying that you're on the jury and there is twelve people on this jury, right?

Q Yes, sir.

A One person—and let me say it was myself—say that I said—say the case [2208] come out to where it could be the minimum. Say that I wanted twenty. My one against eleven—

Q Now, the minimum is five.

A I know that. That's what I'm saying, see. I'm saying twenty and they're saying five. My one against eleven, what would that mean?

Q In a situation such as that, the Court will tell you basically you are to intelligently and honestly deliberate and try to reach a verdict if it doesn't do you any harm.

A Every one has to agree on the same amount of time?

Q It has to be a unanimous verdict, yes. Now, again, the law only requires --we're not asking you to commit to giving anybody five years. The only thing we're , asking you to do is to have an open mind, to listen to the facts and if you feel as though the facts are warranted, if you feel as though the facts warrant a minimum of five years, you be able to have an open mind and be able to give five years, if you feel as though it is warranted. Do you understand what I'm saying?

[2209] A I understand what you're saying.

Q Now, can you do that?

A It would greatly depend on the facts because here again you're coming back to the law. You know, you keep putting that against my personal opinion and the law. Now, like you say, the law has a minimum of five. What I think, my personal feelings, but here again I'm only one.

Q It would depend upon the facts, right?

A Yeah.

Q If you felt as though the facts warranted five years, you would be able to give five years and if you felt as though it didn't warrant five years, you would be able to give twenty, thirty or all the way up to the maximum, but you would have to listen to the facts first?

A You would have to listen to the facts. But also, when you—like I say, here again, I always think about a jury is you

have a number of people. You're not only taking one person's complete—you're looking at eleven other people all total?
[2210] Q That's correct.

A Like you-said, they've got to come to a unanimous decision and somewhere in there, it.'s going to be some concession.

Q Exactly.

A There's got to be some concession between the members of the jury.

Q Okay. See, each juror that is selected in this case or any case, whether it be down in municipal court where the maximum is a $200.00 fine, in order to be qualified you must say—and not only say, but you must be able to consider and, under the appropriate facts and circumstances, be able to assess the minimum all the way up to the maximum. Nobody is asking you to commit to anything. I'm not saying, hey, if you were on the jury, give my client the minimum. I'm saying be objective and keep an open mind and be able to consider and, under the appropriate facts and circumstances, be able to assess the minimum if you believe that the facts warrant that particular penalty. Each juror that serves would have to be able to do that. Again, no one is trying to pin you down. We just want to [2211] make sure that you're qualified for the whole range of punishment.

Now, you said this was your second time down here. There is an infinite number of examples or situations. That's why the range of punishment is so broad. The legislature has set this range of punishment and obviously when they set this range of punishment, they took into consideration the myriad of circumstances and that's why the range is so broad. Do you understand what I'm saying?

A Just to get this clear, it's a minimum of five years for, like he was speaking earlier, murder, just straight out murder?

Q Straight out murder, yeah, and a maximum of life, ninety-nine years or life and an optional fine of $10,000.00.

No one says that you have to give the maximum and no one says that you have to give the minimum. The law requires that you be able to consider and, under the appropriate facts and circumstances, be able to assess the minimum or the maximum or anything within that range if you think that is the proper thing to do. You make the determination as to whether or not you think [2212] it's proper based on the evidence that you hear.

A The evidence is the main thing.

Q Can you do that, sir?

A Well—

Q Keep an open mind, that's all we're asking you to do.

REPORTER: What was your answer?

MR. KENNEDY: I didn't. I just said well.

A Like I say, it would take probably a lot of thinking on my part because for—to me, that's a broad range, five years to ninety nine-years. It seems like to me five years is a small amount to put on a person's life. It seems like the value of a human life is more than that. To say that I might take a person's life and I might only go to jail for five years and a $10,000.00 fine. That would be the minimum that you would be looking at.

MR. NELSON: Excuse me, Judge, and excuse me, Mr. Kennedy. You made a comment that the minimum was five years and a [2213] $10,000.00 fine. I think it needs to be clear that the fine does not have to be assessed. The minimum is five years with no fine whatsoever.

Q But also, the fine can be assessed, too, though. You don't have to, but you can.

MR. NELSON: But that wouldn't be the minimum. If a fine was assessed, it would no longer be the minimum.

THE COURT: You understand that, don't you, Mr. Kennedy?

MR. KENNEDY: Yes.

THE COURT: That fine is at the discretion of the jury, but is part of the potential punishment.

Q Okay. Now, are you trying to-think up some. facts that would warrant a five year sentence at this time?

A Normally in your mind you would think about it because when you say that the minimum is five years, you would try to think [2214] of what situation would come up where a person would only get five years.

Q Now, realize, Mr. Kennedy, that this is your first time down here. Now, you probably have fifty years of trial lawyer experience sitting before you and that's not even including the Judge's experience. The legislature set that range of punishment, from five to life. You don't have to sit there and think of a situation. The only thing that we're asking you to do is to have an open mind to the evidence in the case, just have an open mind to the evidence, and if the evidence establishes in your mind that the proper facts and circumstances have, in fact, been presented and you feel in your heart that the case should be a five year-case, that the sentence should be five years, then be able to assess that, consider it and be able to assess it based on the evidence.

MR. MACALUSO: Excuse me, Your Honor. I'm going to have to interrupt, Mr. Kennedy, and I apologize for that, but I have to object that we're kind of getting [2215] a little bit far afield. The prospective juror should be reminded that we're still talking about a murder case. We haven't heard the word murder in quite a while. It's a murder case where one person knowingly or intentionally—

MR. WEST: Your Honor, I would ask that counsel make a legal objection.

MR. MACALUSO: He can't answer the question—

THE COURT: Ask your question again, Mr. West.

Q Mr. Kennedy, do you understand that we're talking about murder?

A Yes.

Q Okay. That's what we've been talking about for the last five minutes, right?

A The last hour, in fact.

Q If for some reason I go to another subject, I will make sure that you know we're going to another subject, otherwise we're talking about murder, okay?

[2216] MR. MACALUSO: I wasn't suggesting that you went to another subject, Mr. West.

Q Mr. Kennedy, again, the only thing we're asking you to do is to keep an open mind and if you feel as though the f acts warrant a sentence of five years, you be able to assess it. If you feel as though it warrants life, you be able to assess it. Just keep an open mind, that's all we're-asking you to do.

A I feel that I'm pretty much an open-minded person, but it would depend on the facts.

Q That's what I'm saying. It depends upon the facts. That's the whole point. It depends upon the facts that are presented to you. If you feel as though it a calls for five years, whether you can think of a situation right now or not.

A You know, as I have spoken earlier, even if I said that it would come up on a minimum of twenty, which eleven other .people on a jury—and you know, any one—like I said, you-all being out there, you-all know this, even if one person did decide, one [2217] person is not going to be the one to decide the whole verdict. It's got to be a consensus of twelve people.

Q But those twelve people all must be able, in order to be qualified to serve on a jury, to consider the full range of punishment and that's what I'm asking you, to be able to consider and, under the proper facts and circumstances, be able to assess five years and all the way up to life. Like you said, it depends upon the facts.

A Yes, it does.

Q Would you be able to consider the full range of punishment and be able to assess it depending upon the facts that you hear?

A I would say I don't know because it would have to depend on the facts.

Q That's what I'm saying, it depends upon the facts. I'm not saying—again, I'm not trying to commit you to—

A As I said earlier, my personal opinion would be I would say a minimum of twenty. If I was going to be one of the lawmakers or something, I would say a minimum of twenty.

[2218] Q I understand that and you have a right to feel that way, but what I'm saying is, the full range of punishment—in order to be qualified to sit on the jury, you must be able to follow the law and the law is saying that the full range of punishment for murder is from five years to life. I'm not asking you to commit to five years. I'm asking you to have an open mind to five years to life. If you hear facts that warrant the minimum of five years, would you be able to assess it under the facts and circumstances as you view them?

A Yes, I believe I could.

Q Okay. Now, you're saying that you believe that you could. Because of the nature of this particular case—and the law requires me to make sure that you understand—we can't have believes. We have to have a position on it, yes or no. Yes, I will be able, to consider the full range of punishment instead of I believe I could. Again, you haven't heard the facts. You need to have an open mind to the facts. That's all we're saying.

A That's what I'm saying will determine the whole case, the facts.

[2219] Q Exactly.

A Because like I say, you aren't guilty until proven guilty.

Q You may never hear a five year case sitting on this jury or any jury, but the law just requires that, if you did hear a case where you believed five years was the appropriate punishment, you would be able to assess that five years. Can you do that? You said I believe I could.

A Here again, I say it would be—I would have to hear the circumstances. It's hard to say whether I could be open-minded or not. It would just have to depend upon the circumstances. I think I'm a reasonable person, you know. Anybody that is a reasonable person, like dealing with your own kids and stuff, you know you would have to be able see the facts and then you would deal with the situation. I've been a school teacher, so I know with kids, when you're dishing out punishment, you have to deal with the facts. Now, what your beliefs are up front and once you deal with the facts, then you might make a different decision because all cases are not [2220] the same and that's why you've got this broad range. It also depends on the circumstances and that's why I keep going back to that because it's hard to say that you would do a certain thing in any given situation because most people are going to do things differently.

Q See, again, I don't know whether you're misreading me or not, but I'm not trying to get you to commit to anybody's ideas.

A I know what you're saying. You're saying being open-minded to it. I don't know what circumstances. I'm not that familiar with the law as to what circumstances would warrant five years and which would warrant life.

Q And nobody is trying to get you to say what circumstances. There is no way in the world that you-could imagine all the circumstances sitting up there on the witness stand and the law won't let you. The only thing that the law is asking you to do is to -you may not ever hear a case where you would give the minimum of five years. The law only requires that if you do hear that case, if you do, within the next ninety-nine years, a hundred years or so, if you heard

that [2221] particular case, would you be able to assess the minimum of five years, if you heard it and believed that it was the thing to do? You see, don't try to think of circumstances. I'm saying if you heard a case where you believed that it was the thing to do, would you be able to do it? It would have to be based on the evidence.

A Yeah, I believe I could be openminded.

Q Again, you're saying I believe. Are you saying that you could be open-minded and that you would be open-minded?

A Yes.

Q So your answer to the question is that you would be open-minded to the full range of punishment?

A Yes.

Q Now, obviously there's a conflict concerning you being able to—your response to Mr. Nelson's question and the response to my question. You -told him at one point that there was no way in the world that you could consider anything less than twenty years?

A Right.

[2222] Q Now, by me having explained to you, do you understand what the law requires of you?

A Uh-huh.

Q You've got to—

A Yes.

Q Now, what do you understand your role to be as a juror when attempting to make a determination as to what the appropriate punishment is going to be?

A The way I interpret it at this point—well, probably at any point—would be like the evidence and the way that I feel is also going to be in with eleven other people and the way they feel.

Q What is your understanding about the minimum punishment now?

A I understand that the minimum is five years for murder and the maximum is the death sentence.

Q No. It's life.

A But we're speaking of capital murder, right?

Q We're talking about murder. We're still talking about a murder. Now, you're [2223] telling the Court and you're telling the defense and the State that you will keep an open mind as to the full range of punishment and if you hear facts and circumstances that you believe in your heart warrants a five year sentence and if you hear evidence from that witness stand that you believe would warrant a five year sentence, you could consider and also assess it; is that right?

A Yes—well, based on my opinions, it would have to be some strong evidence.

Q I don't have any problem with that. I'm just saying have an open mind to it. If it has to be strong evidence, then fine. That's up to you. The law requires that you be able to consider and, under the appropriate facts and circumstances, be able to assess it. If you're saying there has to be strong evidence, then fine, it has to be strong evidence. You're saying that you can consider and assess it if you felt as though five years was the proper punishment?

A I would say if I felt that way.

Q Again, if you felt that way.

A If I felt that way.

[2224] Q What does that mean?

A That means the evidence would have to be strong enough to make me feel that way.

Q. All right.

A It would have to be very strong because, as I said earlier, I have feelings in one direction. The evidence would have to be very strong. Very, very strong in order to make me change that feeling.

Q Right. That's-all we're asking. So you're saying that you will have an open mind and if you believed that the evidence warranted it, a sentence of five years and you believe—

A You will have to really prove it.

Q Any defense attorney would have to convince you that five years was the appropriate thing to do, right?

A Uh-huh.

Q And you believed that evidence, then you would be able to give five years, right, but you would have to believe it?

A I would definitely have to believe it.

[2225] MR. NELSON: Excuse me, Mr. West and Mr. Kennedy. I'm sorry to interrupt again, but, Judge, Mr. West made a comment that the defense had to prove it, but the defense has absolutely no burden to bring any evidence whatsoever of any type at any time.

MR. WEST: I'll withdraw that, Your Honor.

MR. NELSON: Mr. Kennedy could be called upon to make that decision without the defense—

MR. WEST: I'm withdrawing the question.

Q Mr. Kennedy, if you believed—again, in order to be able to assess the minimum, you would have to believe that the evidence really called for it, right?

A Yes.

Q Okay. In order to assess the maximum, you would have to really believe that the evidence called for it; is that correct?

A Yes.

Q All right. Now, I see that you are a deacon at your church?

[2226] A Yes.

Q Who is your pastor there?

A Reverend C. H. Dorsey, Clarence Dorsey.

Q You work with the finance committee?

A Yes.

Q What position do you hold on the finance committee?

A Finance secretary.

Q How long have you been the finance secretary?

A About six years.

Q Are you a member of Prince Hall?

A I was a member of the Blue Lodge. Since I've been in Dallas, I have not been.

Q Is it a Prince Hall affiliation?

A Well, depending on the degree. I would have to check into it to see what degree it is.

Q What degree are you?

A Third degree.

Q You are a Master Mason, right?

A Yes.

Q I see you're a member of Phi Beta [2227] sigma?

A Right.

Q That's a fraternity?

A Yes.

Q Now, have you ever heard of Omega Si Phi fraternity?

A Oh, yes.

Q If I was an Omega, that wouldn't make you bias or prejudice for or against me in any way, would it?

A No.

Q What do you like about the Cosby Show?

A It's putting a black family in what I would say is a good role on TV, just a standard role, you might say.

Q What type roles are blacks normally cast in in your --

A Well, they have been cast as the ones with a lot of -- well, not portraying a true black family. I know Cosby might be, say, the upper end of one as two doctors in one house, but I like the show.

Q Do you listen to Tom Jones?

A Yes.

[2228] Q Do you ever listen to Willis Johnson?

A Sometimes.

Q Have you understood everything I've said so far?

A Yes.

Q Do you have any questions about what is going on?

A I think I understand what is going on.

Q What about that speeding ticket in that small town-, did you understand what was going on?

A Oh, yeah.

MR. WEST: I'll pass him, Judge.

THE COURT: Mr. Kennedy, believe it or not, I'm going to be the last person that you talk to I want to make sure that I've .understood your answers to Mr. West's questions and Mr. Nelson's questions. The reason I'm doing what I'm doing is, Mr. Nelson talked to you about thirty minutes [2229] ago and some of the things you told him—and then Mr. West asked you in the same area. There's been some time gap between them and, while I took careful notes, I want to make sure that you, Mr. Kennedy, and I are on the same wave length. What I'm going to talk about is this question about your feelings about being able, in a proper case, to assess a five year sentence.

As I recall, as Mr. Nelson summed up, you were asked to consider a situation where you as one of the jurors had found a defendant guilty of the offense of murder. No capital murder. Forget about that, just a murder case such as Mr. Nelson explained. .The jury has found beyond a reasonable doubt that a defendant had knowingly or intentionally caused the death of another individual without any legal [2230] justification or excuse. Mr. Nelson-explained that that might be self-defense or it could be what we call voluntary manslaughter, that situation about involving your child in the sex abuse situation, or insanity. Those are defenses. If you, as one of the jurors, found that one of those things existed, you wouldn't find the Defendant guilty in the first place of murder. Do you understand? That's all out of the picture. You don't have that kind of situation.

You have the knowingly or intentionally causing the death of another individual by some manner or means, shooting, stabbing, choking. So you found the Defendant guilty of that.

Now, at this point in time, here's what the lawyers have been saying to you—and I think they were quite accurate in the way [2231] that they did it. They didn't mislead you or try to. The only reason I'm coming back at you is, there was gap of time. What both of them were saying is this: Both sides in this case, both the State and the Defendant, are entitled to twelve jurors over there in the jury box, if they have found a defendant guilty of the offense of murder, to have twelve people in the punishment phase of the case who can be of a frame of mind that, if they heard facts and circumstances in that case or whatever they might hear at the punishment phase, if anything, would in a proper case—that individual juror working together, as you said, with the eleven other .jurors, would in a proper case be able to assess a punishment anywhere within the range of punishment that the law allows for a murder case which is five years [2232] in the penitentiary up to a ninety-nine year sentence or a life sentence and in addition to that, as Mr. Nelson pointed out, a fine of up to $10,000.00, if you wanted to. The question then comes down to, if you were a juror in a murder case and in a proper case, if the facts and circumstances warranted it in your mind and you thought it was proper, could you assess a five year sentence for the offense of murder, that is the knowing or intentional causing death of another individual?

MR. KENNEDY: There again, listening to what they have said and also making me think that you would also have to go along with .the concept of the law.

THE COURT: What the law provides for, as Mr. West pointed out properly and I think Mr. Nelson did, too—the law doesn't [2233] require you to imagine the facts it would take you to give a five year sentence, but what the law is saying—and I'm not going to say it quite as delicately as they did—if you are a juror who says I don't care what the facts and circumstances I ever heard in a murder case are, I could not assess a five year sentence, that's one thing. If you're a juror

who says I can't imagine facts and circumstances, but if I heard them, I could assess a five year sentence, that's still another thing. Where do you fit yourself in that picture?

Are you of the frame of mind that you could never hear a case where a five year sentence would be appropriate in your mind for murder?

MR. KENNEDY: In those circumstances, I would have to put myself—as I've told them, I [2234] would put twenty years on someone's life. It seems like it would be valued at more than five, but if you have to weigh the circumstances and you look at it and you've got twelve people over there judging, your decision—you should be open-minded about it. You should be able to, with those twelve people, come to some sort of conclusion.

Now, mine may be twenty years, but I would like to judge it on the fact.

THE COURT: Well, if those facts—could there be a set of facts in your mind that would permit you to participate in a sentence of five years with your other fellow jurors?

MR. KENNEDY: I would put it this way. Are you just asking me if I could be open-minded or not because I wouldn't know how—what facts it would take to say [2235] this one is five years. When I think of something, I think of a murder, then I think of it as taking a person's life. I would say here is my value that I would put on a person's life. This is the way that I look at it. Now, you can present facts and I know, being on a Jury, you would have to sit there and be open-minded because you can't go in and say, okay, this person killed so hang him because you don't know all the circumstances and facts. That's what you're asking me to do, listen to the facts. They asked me opinion and I gave my opinion. If I can be open-minded—I think I can be open-minded enough, yes. My main thing is, you've got to listen to the facts.

THE COURT: If you heard a set of facts that told you five years was the proper punishment in a murder case, could you vote for [2236] it, a five year sentence if you heard that set of facts? Can you give me a yes or not to that? I hate to do like the lawyers did, but I've got to have a yes, I could or no, I couldn't.

MR. KENNEDY: Like I told him, there would have to be strong facts. Facts could change a person's opinion. I'm not saying a person's opinion could-not be changed, but I'm a pretty strong opinionated person. The facts would have to be—well, I know they would.

THE COURT: Did you day yes?

MR. KENNEDY: No. I haven't answered you yet. I was thinking about it.

THE COURT: Take your time. .This is obviously an important question because we've spent a lot of time on it. I'm sorry that I have to bring you to the point of saying yes, you could or no, you [2237] couldn't, but I do need to do that to determine your qualifications in this case.

MR. KENNEDY: I would say yes.

THE COURT: I hold that he is qualified, Mr. Nelson.

MR. WEST: Your Honor, I have a few more—

THE COURT: I'm sorry.

Q For record purposes, and I'm not asking you this to be funny or anything like that sir, okay?

A Okay.

Q You may say it's apparent in the courtroom as to what your race is, but it's not apparent on the record. This stenographer here is taking the record. Could you tell me what your race is, sir?

A Black.

MR. WEST: Nothing further.

THE COURT: What says the State, Mr. Nelson?

MR. NELSON: Your Honor, at this time the State will exercise [2238] a preemptory challenge.

THE COURT: Mr. Kennedy, you'll be excused from any service in this case and I want to thank you on behalf of the lawyers for your patience with us and your candid answers this afternoon. I believe you've told us exactly how you feel. You were asked some hard questions and gave some hard answers. Thank you, sir.

MR. WEST: Your Honor, before he gets off the stand, I want the record to reflect the nine strikes that the State has used, they've used six on blacks.

MR. MACALUSO: Thank you very much, Mr. West.

THE COURT: I won't comment on those number because I don't .know. Let's take a very short break.

MR. NELSON: Your Honor, I want to put one other thing on the record before or after we take our [2239] break.

THE COURT: Do you want to do it after our break, Mr. Nelson? We'll do it when we come back.

(Whereupon, Mr. Kennedy left the courtroom, after which the following proceedings were held.)

THE COURT: Go ahead and do it now.

MR. NELSON: Your Honor, the State would like the record to reflect the following reasons for our exercising a preemptory challenge on Mr. Kennedy: He was hesitant about assessing the death penalty in this type of case, that being a murder during the course of a robbery. As matter of fact, his comment was that he felt the ,death penalty was probably only appropriate for a mass murder situation. He further was hesitant in answering the questions yes in spite of his [2240] personal feelings which would be opposite. For example, if he thought the Defendant should receive a life sentence, he

hesitated for a great deal of time in saying whether or not he could still answer the questions yes knowing it would result in the death sentence. Because of that, the State exercised a preemptory challenge on this potential juror.

(Whereupon, a short break was taken, after which the following proceedings were held.)

THE COURT: Mr. Salsini, I don't believe you raised your hand yesterday in reference to the question about having any conflict, did you?

MR. SALSINI: No.

THE COURT: The only thing I want to say to you before I turn you over to the lawyers is, to do what you're doing now which [2241] appears to be just leaning back and relaxing and answer these questions like you feel and don't worry about telling the lawyers something you think they want to hear. Just tell them how you feel about things.

* * * *

[3837] TROY L. WOODS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, whole truth and nothing but the truth, examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Woods. Let me begin by reintroducing everybody here. I'm Paul Macaluso. This is Jim Nelson and we're the lawyers for the State. We work for the district attorney's office and we're representing the State of Texas and Dallas County in this case.

Next to Mr. Nelson is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Woods?

MR. WOODS: Fine. How are you?

Q And next to Mr. Cunningham is Mr. Royce West.

MR. WEST: Mr. Woods, good afternoon.

Q They're the defense attorneys. [3838] They're defending the man who is charged with capital murder. He is the Defendant and his name is Thomas Joe Miller-E1. He is at your very far right, Mr. Woods. You're tall enough. I think you may be able to see him from where you are. Do you see him down there? That's the Defendant and he is charged with capital murder which, as you know, is the most serious offense under the laws of this state. It's serious because of the type of offense it involves, capital murder, and it's also serious because it carries the two most serious types of penalties under the laws of this state. One is a sentence of death and the other is a possible sentence of life. These are things that the judge discussed with you the other day.

I'm trying to remember if you have been down here on jury here on jury duty before.

A No.

Q You have not served on a jury before?

A No, sir.

Q Ordinarily, Mr. Woods, if you came down here for any other type of case, you would [3839] be interviewed by the lawyers. The lawyers would talk to you, but we would ask you questions as you sat out there like you did on Monday with all the other people. We would ask you four or five or six questions and so forth and so on. The law allows us in this type of a case only to talk to you individually as we're doing now. It's kind of private here now, isn't it?

A Yes, it is.

Q It's a lot more private than it was yesterday. I think the idea behind that is, because the death penalty is involved in this case, so you can be as relaxed as you can possibly be

without having a bunch of strangers around here to hear what you have to say. Do you see what I'm getting at?

A Sure.

Q Relax as much as you can, Mr. Woods, and I want you to bear in mind that nothing you tell us would be wrong or right. All we want to do is know how you feel. You don't have to say anything to please any one of us. That's not your responsibility. Your only responsibility is to tell us how Mr. Woods [3840] honestly feels about anything. If you do that, you will be doing your job. I want you to know that no one is going to argue with you or quarrel with you or try and talk you into something or sell you a bill of goods. If you have a question about anything, you ask it. If there is something that you need to tell us, you just tell us what it is. Like I said, we're trying to find twelve people to act as jurors. We only have seven. We have either talked to or considered ninety-eight people and we only have, out of those ninety-eight, seven that are qualified to serve on this type of a case. Do you see what I'm getting at?

A Yes.

Q Because it's a very special type of a case when it involves the taking of another human life. Now, let me tell you what our position is, Mr. Woods, that is what the State of Texas, that is Mr. Nelson, myself and Norman Kinne, who was not introduced to you yesterday, but he's actually the lawyer who will be leading on this case once it begins. We are actively seeking the death penalty in this case for Thomas Joe Miller-El. What I [3841] mean by that is, we intend to offer evidence before this jury once the trial begins to prove that Thomas Joe Miller-El is guilty of capital murder just as he is charged in this indictment. In other words, he did the capital murder. In the second phase of the trial, we intend to offer evidence to convince a jury beyond a reasonable doubt that the questions that determine life or death should be answered yes which will automatically result in the Defendant being sentenced to be executed down at Huntsville,

Texas. That's our desire based on the evidence. I make no bones about it, Mr. Woods. We know that the law allows for the death penalty in this type of a case depending upon the evidence and we're going to do our dead-level best to provide this jury as the law requires with the type of evidence that will result in this jury making a decision that would result in this man being taken down—well. first of all sentenced to death and then at some later date being taken down to Huntsville, Texas where the penitentiary is, placed on death row and then at a time designated by law, taken over to the death [3842] house where he will be put on—do you know what a gurney bed is or what a gurney is?

A Sure.

Q Put on a gurney, taken to the death house where he's strapped down. They put a needle in his arm and inject him with enough of a drug, a lethal substance, to put him to death and eventually in a grave somewhere, someplace. Now, I don't mean to be gory about it, but this is not something—this is something we've told all the jurors just to be fair with them, Mr. Woods.

MR. WEST: Your Honor, that is a misstatement. All the jurors have not been told that.

THE COURT: I'll sustain that. Let me say, Mr. Woods, that we talked to some—I believe you're juror number ninety-eight and obviously every juror hasn't been told the same thing for one reason or another.

MR. WEST: Your Honor, could the juror be excused for one second for purposes of the record?

[3843] THE COURT: Sure. Mr. Woods, let me ask you to go out in the hall.

(Whereupon, Mr. Woods, left the courtroom, after which the following proceedings were held.)

THE COURT: Go ahead.

MR. WEST: For purposes of the record, I think the record should reflect that it is my recollection that not all of the jurors have been told that, but all of the black jurors have, in fact, been told that either by Mr. Nelson or Mr. Macaluso.

THE COURT: I won't comment on that because I haven't kept track of it.

MR. MACALUSO: Judge, I would renew the objection made that, if either side had a legal objection to make, to make a legal objection. I don't see that there is any legal objection.

[3844] THE COURT: I don't think it is, either.

MR. WEST: I just wanted the record to reflect that.

THE COURT: I'll sustain the objection. Let's go ahead. regards to that, I know some jurors, the record will reflect, have been told that. Who they were or what their situation was, I don't know.

MR. NELSON: All the jurors have been told that we're actively seeking the death penalty, Judge. It's been put different ways, but they've all been told that, that we're seeking the death penalty.

MR. WEST: Judge, the only thing that I'm saying is, as far as the description of the taking .him down to Huntsville from death row to the death house and being tied down to a gurney and then a needle put in their arm and then injected with a lethal substance [3845] until they are dead and he added put him in a grave this time.

MR. CUNNINGHAM: The statement was made that we have told every juror that and that's not true. Mr. Nelson didn't tell the last one and Mr. Macaluso didn't tell the one before.

THE COURT: Let's move on. We could argue about this for an hour. I don't think it makes any difference. I mean, it does, but what a juror understands is one thing. Go ahead.

(Whereupon, Mr. Woods returned to the courtroom and the following proceedings were held.)

Q Mr. Woods, the reason I tell you that is to put you on notice. We have put all the jurors on notice what our position is with regards to this case, all the jurors that we've talked to. It is only out of fairness to you and the other jurors that you know exactly what the stakes are in a case of this type. I'm [3846] sure when you came down here or I'm reasonably sure that when you came down here, you thought like most people did, you would end up on a burglary case or a theft case maybe, a DWI, or something like that. I don't imagine many people came down to the courthouse on Monday, who are on this panel here, thinking that they would be involved in a capital murder case where they might be called upon to make a decision that would result in them actually—you know, one of the people out there on that jury panel making a decision that would result in another person, Thomas Joe Miller-El, being put to death, being executed.

You know that they're executing people in Texas these days. It's not a situation where you're just reading about it, as you read about that from time to time or you hear about it on the radio or on TV. But if you were actually on a jury of this type, you could be called upon to make decisions that would result in you actually participating in that decision. Like I say, it's not something where you just kind of talk about it with friends or your family. It's not a situation [3847] where you read about it or hear about it. I guess what it boils down to is, you at this particular point are right in the middle of it. Do, you see what I'm getting at?

A Sure.

Q The reason why we tell you this is to make sure that it's clear as we can just what would be involved in this type of a case if you're selected as a juror. As I said earlier, you know as well as I do that this is the type of case, when you talk about the death penalty and you talk about capital punishment, you talk about executing somebody, people have strong feelings one way or the other. Do you see what I'm getting at?

A Yes.

Q Now, what we want to know and what is most important in the final analysis, Mr. Woods, is how you feel about it?

A About capital punishment?

Q Right..

A About capital punishment, I think that punishment is too easy. I think that's a quick relief. I mean, you know, to give a person quick relief—what I call capital [3848] punishment is you give somebody hard labor for the rest of their life. I feel like that's more of a punishment than putting theca to sleep.

Q Well, you just think that's too easy?

A Yeah.

Q In other words, you feel, when someone is executed, it's over.

A It's too quick. They don't feel the pain. That's the way I feel about it.

Q What do you think a person ought to receive for committing the worse types of crimes? What sort of punishment do you think they ought to receive?

A Well, what I call punishment is back to the old Indian days. Pour some honey on them and stake them out over an ant bed. That's the way I feel about it. That's what I call punishment.

Q Do you have anything against the death penalty itself?

A No. I don't have anything against the death penalty.

Q Do you know of any reason, Mr. [3849] Woods, why you couldn't serve on this jury and answer questions and follow the law if it meant you making a decision that would mean this man ultimately down here would die? Could you make that decision?

A Sure, I could make the decision.

Q Do you think you could do it?

A Sure.

Q Even if it meant, as a result of your decision, that man—can you see him where he is?

A Sure.

Q Breathing the same air we're breathing here in the courtroom, he would be taken down to Huntsville and put to death?

A Sure, I could make that decision.

Q Do you know of any reason whatsoever why you couldn't do that?

A No, I don't know no reason at all.

Q Why do you think people ought to be executed in the first place?

A I think if people go out and take people's lives for no reason at all, I think everybody should be punished.

Q If I told you I was against the [3850] death penalty or against real serious punishment and you were for it, and obviously you are, isn't that right, what would you say to me to try and convince me that I should give the death penalty to somebody and why it is proper?

A Because we don't need people like that on the streets.

Q Have you ever felt differently about that?

A No. I've felt that way all my life.

Q All right. Let me ask you this: You said that you felt they should be staked out over an ant hill—

A That's not what I call being funny, but—

Q I agree with you. That would be some kind of punishment. That's not the law you understand?

A Yes, I know.

Q Let's just say it was the law. Do you think you could actually sentence someone to be staked out over an ant bed?

A Sure. I feel like if they survive

* * * *

[3852] Q How about your folks, are they alive, Mr. Woods?

A Sure.

Q Do you know how they feel about the death penalty?

A No. I never discussed it with them.

Q You're a married man. How about Mrs. Woods, do you know how she feels about it?

A She's been on jury duty before, but I have never discussed that with her before.

Q If you had to hazard a guess, what would you say?

A I feel like she would go for it.

Q All right. Let's talk a little bit about the law in this type of a case and a trial of a criminal case generally. A person can only receive the death penalty, Mr. Woods, in Texas for the offense of capital murder. It doesn't matter whether he rapes somebody. It doesn't matter whether you rob somebody, commit theft, or anything. You have to commit a murder first and it must be a very special type of murder. The death penalty is only available [3853] as a punishment under very rigid circumstances for capital murder only. Am I making myself clear?

A Sure.

Q Capital murder involves a murder and murder is a situation where one person knowingly or intentionally causes the death of another without any legal excuse or legal justification. Am I making myself clear?

A Sure.

Q Okay. By that I mean, when you think about murder, you don't think about self-defense. If I kill Mr. Nelson and you believe I did it in self-defense, that's not murder. That's a

homicide, but it's not murder. You would have to find me not guilty.

A I understand.

Q Just like I would find you not guilty. The same thing if you kill accidentally. It's not murder. It's not guilty. Let's say you believe I was insane. When I killed Mr. Nelson, you believe I was insane. Not guilty. That's not murder. The same thing would be true if I came home and found out that someone that I love, like one of [3854] my children, had been sexually molested by my neighbor and he's up the street laughing about it, do you see, and I go into a rage and pick up a gun and run up the street and I kill him. Now, that's a homicide. It's bad, but it's not murder. That's a crime of passion and the law says that's voluntary manslaughter. It's not murder.

You must first commit murder. Even that type of murder, just regular murder, call it, you can't receive the death penalty for that. If you commit murder and you murder a police officer or a fireman, a jail guard or you commit murder for money or you commit murder where you kill a bunch of people, then that becomes capital murder it becomes more serious, .you see, that type of murder. if you commit murder while you're committing a robbery, if you rob somebody and kill them, or raping them and you kill them, you commit burglary and-kill somebody, arson or kidnapping, then murder under those circumstances becomes capital murder and you can receive the death penalty. Am I making myself clear?

[3855] A Sure.

Q How do you feel about that?

A I feel like calling a person insane, we're letting too many people get away with it, talking about insane. I feel like we ought to be able to given this to capital murder.

Q We'll talk about that in just a little bit. Let's forget about insanity for a little bit, all right?

A Okay.

Q How do those particular types of capital murder square with your way of thinking of what a person ought to receive—

A Fine.

Q Do you think a person ought to receive the death penalty for killing a police officer?

A Sure.

Q Do you think a person ought to receive the death penalty if he's robbing somebody, goes into somebody's business, for example, pulls out a gun and robs and kills them?

A Yes, even more so.

[3856] Q What would you give them for doing that? If you had your way about it, what would you do to somebody who went into a place of business, robbed somebody, and then executed them?

A I feel like they should get capital murder.

Q Would you have any problem returning the death penalty in a case like that?

A No.

Q You understand, before you could even consider the death penalty under the law, it would have to be for a type of capital murder?

A Yes.

Murder during a robbery—we've alleged in this case for Thomas Joe Miller-E1, that man right down there, that he killed a man by the name of Douglas Walker while he, Thomas Miller-E1, was robbing Douglas Walker. So we have the murder. We've accused him of murdering Douglas Walker while he was robbing Douglas Walker. I believe you said, if we proved that to you beyond a reasonable doubt, [3857] would you find him guilty?

A Sure.

Q If we don't prove it to you, you find him not guilty?

A Sure.

Q If we prove to you, in the second part of the trial—and you understand that the second part of the trial is where the issue of life or death is determined?

A Right.

Q You understand, in the first part is where you decide whether we've proved someone is guilty or not guilty?

A Yes.

Q You can do that? If we prove him guilty, you can find him guilty and, if we don't, you will find him not guilty?

A Right.

Q Now, in the second part of the trial, you're called upon to answer these questions. Did you get a chance to read those yesterday?

A I read these two here. I didn't see that.

Q It used to be under the old law [3858] just like in the movies. After a jury heard all the evidence in a murder case or a capital murder case, the jurors actually went back in the jury room and decided whether a person should receive the death penalty or a life sentence. If they all agreed he should get death, that's what the judge gave him. If all the jurors agreed he should get life, he got life. Do you think you could do that if you were called upon to do that?

A Sure.

Q Well, the law changed—that's kind of a trick question. The law changed about ten or twelve years ago and you don't do that directly. Instead, you answer questions. You don't decide whether somebody should live or die. You don't make that decision at all. You're not even asked to make that decision. All you do is, after you've heard all of the evidence, you decide whether or not we proved to you that these questions should be answered yes. If we do, you should answer them all yes. The effect or the result is, three yes answers is a sentence of death automatically. You don't have to write in death. You just answer [3859] the questions yes and the Judge sentences the Defendant to be executed. Do you see what I'm getting at?

A Yes.

Q On the other hand, if you answer one or more of the questions no, do you know what happens then? The judge automatically assesses a sentence of life for the Defendant. Do you see?

A Yes.

Q You don't decide life or death directly. You answer the questions and then the determination is made on the basis of the answers. Do you see what I'm getting at?

A Yes.

Q Could you do that?

A Sure.

Q Do you know of any reason why you couldn't do that?

A No.

Q You looked at the first two. The third question there—let's take them out of is if order. The third question, all that does ask you whether or not this was a provoked killing or was it an unprovoked killing. If [3860] you decide it was an unprovoked killing, you answer the question yes. Yes, it this was an unprovoked killing. Do you see what I'm getting at?

A Sure.

Q If on the other hand you decide there was some provocation that the victim did something to provoke the defendant into killing him, then you decide whether the defendant acted reasonably or unreasonably. Do you see how you could answer that question yes or no?

A Yes.

Q Okay. Now, let's turn to question number one. Does that cause you any problems at all?

A No.

Q Does that seem like a reasonable question to decide whether or not the defendant acted deliberately and with the reasonable expectation that someone was going to die, either the deceased or somebody else?

A That's a good question.

Q Do you see how you could answer that question yes or no?

A Yes.

[3861] Q Any problem with that?

A No problem.

Q Number two asks you, is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. What do you think you're being asked there?

A I think they want to know, if he got out again, would he act again.

Q All right. If he got out again, would he do it again?

A Yes.

Q All right. The key word may be that word probability. What do you think that word means? What do you think they're driving at with that question?

A Probably that he would do it again.

Q Would he probably do something like that again. You notice, Mr. Woods, that it didn't say would he probably do another capital murder or would he do another murder.

A A criminal act.

Q Of violence?

A Right.

[3862] Q What sorts of things come to your mind when you think of a criminal act of violence?

A Anything that you could do to harm somebody or kill someone or something like that.

Q Taking a baseball bat to Mr. Nelson, for example, and beating him up would be a criminal act of violence?

A Right.

Q Another murder, robbery, rape?

A Right.

Q What do you think would be valuable to you, what would aid you in answering that question yes? What would you want to know about someone before you would

say, yeah, he would probably commit some criminal act of violence?

A It would depend on what we was talking about it, what I feel like that he might do and whatever kind of trouble that he was in, what we was trying him for.

Q What he did this time?

A Right.

Q Maybe what he did before, if he [3863] had done something before?

A That's what I would base that question on.

Q If you learned what role he had in the crime itself for which he's on trial, in other words you learn about if he was involved in the planning, did he plan it or did someone else plan it; during the offense, did he participate directly, was he calling the shots or was he standing by; did he have to kill this individual or did he not have to kill him. Do you see what I'm getting at?

A Right. That's the way I would answer that question.

Q Then after the crime, how did he react afterwards; was he sorry or was he just kind of blase about it? Do you see how you could learn enough about an individual to say, yeah, this is the guy that probably will do something like this again?

A Right.

Q In which case you answer the question yes?

A That's if we've already answered the question yes, he was involved and we're [3864] really wanting to know if he would do all these criminal acts again because ninety-nine out of one, there's one that did at least two or three acts that way. They're going to constantly do it again.

Q You understand that these three questions are what separates life and death?

A Right.

Q If you answer one of the questions no, he gets a life sentence. If you answer all three of the questions yes, he gets a death sentence. I don't mean to keep harping on this, but do you know of any reason why, if you were on this jury and the

proof convinced you that those questions should be answered yes, knowing that it's going to result in this roan over here being executed, do you know of any reason whatsoever why you wouldn't answer those questions yes?

A No, I don't know no reason at all.

Q Now, let's shift gears here for just a second. We've talked about life or death because that's the penalty for capital murder. A lesser offense of capital murder would be murder. Let's imagine just for a [3865] moment, as an example, that you're on a jury and let's say we charge the man—not this man, but some imaginary man—with capital murder. Let's say he committed murder during a rape. That's capital murder. We have to prove the murder and the rape. Got it?

A Right.

Q Let's say we prove the murder, but we don't prove the rape. You couldn't convict that person of capital murder under those circumstances because we didn't prove both of them, did we?

A No.

Q What did we prove?

A You proved murder.

Q If that were to happen, you would find him not guilty of capital murder and you would find him guilty of murder which is what we proved. Under a situation like that, Mr. Woods, the range of penalty is altogether different. It is no longer life or death. You just forget about that for the moment. The range of penalty for murder is from five years to ninety-nine years or life. Can you see how broad that is?

[3866] A Yes.

Q The law allows you, if you sit on a murder jury, to find someone guilty of murder an-d consider the full range of penalty. Do you think you could do that?

A Yes.

Q I know you feel strongly about murder, don't you?

A Sure. I always feel that way. Anybody that go out and take somebody's life, I always feel that way.

Q By the same token, would you agree with me that there are all different types of murders and murderers and victims?

A Sure.

Q You know as well as I do, if we sat here for ten hours or ten days or ten minutes, we could think of a thousand or a. million different situations where one person could end up killing another. Do you agree with that?

A Yes.

Q The law expects you, to be a qualified juror, to just say you will keep an open mind. Do you have an open mind?

[3867] A Sure.

Q Even though you consider all murders serious, you will agree with me, won't you, that some are more serious than others?

A Right.

Q Some killers deserve more time than others?

A Right. I agree.

Q Some may deserve less than others, right?

A Right.

Q All the law expects of you is to keep an open mind and wait until you've heard the evidence in a murder case. You haven't heard one stick of evidence so far, have you?

A No.

Q Just keep an open mind and tell us that you will follow the law and, if you hear a case that calls for the maximum and you think the right thing to do and the just thing to do, in other words, the proper thing to do is to give the maximum, you will give the maximum because you think he deserves it. Do you see what I'm getting at?

A Sure.

[3868] Q By the same token, you will keep an open mind and listen to all of the evidence in a murder case before you make up your mind anal don't prejudge anything and just say, if you hear a case that calls for five years and you think that's the right thing to do even though it may be few and far

between, if you hear a case that calls for the minimum and you know that's five years, you will give the minimum. Can you do that?

A Sure.

Q Any doubt in your mind about that?

A No.

Q Or anywhere in between, if you hear a case that calls for fifteen years, you will give that; twenty-five years, you will give that; fifty years. Can you do that?

A Sure.

Q Let me talk about one other thing. You understand that you don't have to imagine a situation where you would give five years or ninety-nine years or life?

A Right.

Q You've just got to say that you will keep an open mind. Will you do that?

[3869] A Right.

Q All right. The Judge will instruct you in regard to the law and the range of penalty for murder—this is kind of strange situation, Mr. Woods. The law tells you about what we all know a little bit about and that's about the fact that people charged and convicted of murder and go to the penitentiary get paroled, don't they?

A Right.

Q There is such a thing as parole and such a thing as getting good-time towards parole and so forth. The Judge will give you some lengthy instructions when you go back to deliberate a murder case about these things. He tells you that a person—you get to know about these things, about parole and good-time. Then as soon as he gets through tell you that, he tells you that, because you cannot adequately predict how soon someone is going to get a parole or how that good-time is going to enter into it, you cannot consider either goodtime or parole in deciding how much time a person ought to get for murder. Do you see what I'm getting at?

[3870] A Yes.

Q He tells you about it and then he says forget about it?

A Right.

Q That's not the Judge doing that. The Judge is just applying the law. You understand that?

A Yes.

Q In other words, you might listen to a murder case and say, well, under these facts I think he ought to get fifteen years or five years, but I think he's going to be paroled, so let's give him ten and then he will serve five years. That's a matter that comes up before the Board of Pardons and Paroles and the governor. It's really not your concern. Do you see what I'm getting at?

A Yes.

Q You just listen to the evidence that you have and you decide what the person ought to receive and not let the fact that a person could get good-time or parole. Can you do that?

A Yes.

Q Now, let me just ask you. Could [3871] you put aside your feelings—you said you had strong feelings about murder and murderers, that you think people who commit bad murders ought to get something more than the death penalty; is that right?

A Yes, sir.

Q How do you square that with your thinking that you can give five years in a murder case or fifteen years?

A I don't think that's fair to just give a person something like that for going out to take people's life.

Q Do you think you could listen to a case and give five years if you thought it was proper?

A Give five years?

Q Yes.

A I don't feel like it's the right thing to give a person five years when I feel like he should get more.

Q Now, you understand that you haven't heard any evidence yet?

A I know. I wouldn't give him five years without hearing the evidence.

Q You're not going to give anyone [3872] ninety-nine years or life either, are you, until you hear the evidence?

A No. Right.

Q Are you telling me, Mr. Woods, what you're going to do is, even though all murders are bad, you will take into account all of the circumstances surrounding the murder and wait until you've heard all the facts to see how bad the murder is and what the relationship was between the guy that did the killing and the guy that got killed, what their backgrounds are, you know all of the realistic things that you can consider that would make one murder worse than another and, if you hear a case that calls for five years, you will give five years and, if you don't think it's worth five years, you will give-ten years, fifteen years, twenty years and all the way up to ninety-nine years or life. Will you do that?

A Sure.

Q You understand that it may be a rare case where you're going to give five years and it maybe a rare case where you would give ninety-nine years or life, would you agree with me?

[3873] A Sure.

Q It may take particular facts to give five years and real rare facts to give ninety-nine years or life, but if you hear them, you will give five years if you feel that's the right thing to do? Am I reading you right?

A Sure.

Q All right. I think I'm about out of time, but let me just ask you this: You understand that Mr. Miller-El here is presumed to be innocent. You understand that?

A Sure.

Q We've got to prove his guilt. You understand that the indictment is no evidence of guilt? That doesn't mean anything?

A Right.

Q You understand, if he doesn't want to testify, you can't hold that against him?

A Sure.

Q He may or may not testify. I don't know, but if he doesn't, you can't go back and say, well—you can't even discuss that fact. You can't say, well, that guy didn't take the stand, so he must be guilty. [3874] How do you feel about that?

A I can't prove nobody is guilty until they're proven guilty.

Q You understand that the State has got to do the proving?

A Right.

Q Can you go along with that?

A Sure.

Q You understand that you don't automatically believe the testimony of a police officer. Would you?

A No, I won't automatically believe anybody.

Q You would just judge the witnesses as they come; is that correct?

A Right.

Q Mr. Woods, I'm about out of questions here. I'm out of time, more important than that. Your favorite TV show is Rawhide; is that right?

A Right..

Q Is that still on?

A Yeah, it's still on.

Q On Channel 39?

A Yes.

[3875] Q I've seen the Lone Ranger on Sunday mornings. Let me just ask you: Do you have any questions at all of me, Mr. Woods?

A No.

Q Do you know of any reason why you can't be a fair and impartial juror to both sides?

A No, I don't know no reason at all,

Q It boils down to this, Mr. Woods: If we prove to you beyond a reasonable doubt that the Defendant is guilty just as he is charged in this indictment of capital murder, do you know of any reason why you wouldn't find the Defendant guilty of capital murder?

A No reason.

Q If we prove to you that these questions should be answered yes, do you know of any reason why you would not answer each question yes knowing that it would result in this Defendant being taken down to Huntsville and put to death?

A No reason at all.

Q I appreciate it, Mr. Woods.

MR. MACALUSO: I'll pass the witness.

[3876] EXAMINATION

BY MR. CUNNING-HAM:

Q Mr. Woods, as you have been told, my. name is Cunningham and along with Mr. West, to my left, we represent Mr. Miller-El in this case. I would like to ask you some questions concerning your questionnaire and possibly some questions concerning what Mr. Macaluso has asked you about. This may seem like a ridiculous question, but this is for the purposes of the record. What is your race?

A Negro.

Q Where is Harbor Road located?

A Oak Cliff, South Oak Cliff.

Q Are you buying there?

A Bought.

Q You own the house?

A Right.

Q How long have you owned your own home?

A My wife had it when she and I got married.

Q How long have you been living there with her?

A Twelve years.

[3877] Q You work for Stewarts Contract?

A Yes.

Q You're an assembler?

A Yes.

Q You've been with them thirteen years?

A Right.

Q How long have you been a Cowboys fan?

A Ever since they've been the Cowboys.

Q What do you think about a Redskin fan?

A I never was a Redskin fan.

Q How often do you go fishing?

A I go fishing every weekend.

Q Where do you go fishing?

A Lake Lavon.

Q Do you catch anything there?

A They're not biting.

Q How long have you been a member of Porter Temper Church?

A My wife is a member. I'm really a Baptist and my wife, since she and I got married, has become a CME.

[3878] Q In other words, she converted you?

A Well, no. As a kid I grew up in the CME. When I moved to Dallas in '56, I become a Baptist.

Q After you got married, you went back to what you were at the very beginning?

A Right.

Q Are there any members of your family or close friends who are in law enforcement.

A No.

Q You've never been in the military?

A No.

Q Do you know of any reason why you couldn't be a fair juror if chosen in this case?

A No.

MR. CUNNINGHAM: Pass the juror.

MR. MACALUSO: May we have a few minutes, judge?

THE COURT: Surely. Mr. Woods, let me ask you to step out in the hail for just a few moments.

[3879] (Whereupon, Mr. Woods, left the courtroom, after which an off-the-record discussion was held, after which the following proceedings were held .)

THE COURT: Mr. Macaluso, what says the State?

MR. MACALUSO: We'll accept the juror.

(Whereupon, Mr. Woods returned to the courtroom and the following proceedings were held.)

THE COURT: Mr. Macaluso, what says the State, please, sir?

MR. MACALUSO: The State would be pleased to accept Mr. Woods as a juror on this case.

THE COURT: Mr. West?

MR. WEST: Your Honor, the defense would be pleased to accept Mr. Woods on this jury.

THE COURT: Thank you. Mr. Woods, let me do a couple of

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[55] CYNTHIA RAY YOUNG,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Ms. Young. My name is Paul Macaluso and to my immediate left is Jim Nelson. You may recall yesterday there was another gentleman who was seated right where I'm pointing now and his name is Norman Kinne. Norman, Jim and I are assistant criminal district attorneys

here in Dallas and we represent the State of Texas in this particular case. We're the lawyers for the State.

To Jim's immediate left is Mr. Brice Cunningham and to Mr. Cunningham's immediate left is Royce West. They're the lawyers who have been appointed to represent the accused Defendant in this case and his name is Thomas Joe Miller-El. He's seated to their immediate left in the light blue suit over there. Can you see him from where you're sitting?

* * * *

[59] with your personal feelings about anything. You understand the very serious nature of what we're about here today and I think you understand why we absolutely need to know some things about your background and how you feel generally?

A Yes, sir.

Q Now, let me start off by telling you exactly what the State's position is in this case. The Judge foreshadowed some of this yesterday. We are actively seeking the death penalty in this case for Mr. Miller-E1. I just want to put you on notice of that right at the very beginning so you will know exactly where the State stands with regard to this case and this Defendant because we intend to be able provide a jury, once it's selected—and, of course, that would mean you, if you're on the jury, and eleven others—with both the type and the quality of evidence that would convince them in the first part of the trial beyond any reasonable doubt whatsoever that that man is guilty exactly as he is charged in this indictment and nothing less.

In the second phase of the trial, [60] once again, to be able to provide that jury with the type and quality of evidence that would convince them beyond any reasonable doubt whatsoever that all those questions, whether they be two or three, as it turns out, should be answered yes. You know the result is that the Defendant would automatically be sentenced to

death under the laws of this state. That's our position. Of course, they have their position and they're entitled to that. Ultimately it's up to the jury to decide, but we want you to know going in what our position would be based on the evidence that we intend to present. Okay?

A Yes.

Q Now, just to get those preliminary matters out of the way, let me just ask you -and it really boils down, I guess to a large degree in any case, to some of the questions you've already answered here on the second and third from the last page of the questionnaire. Let me ask you: Even though you had little time to do that yesterday, really, and certainly little time to think about it. You've had overnight, but let me just ask you [61] if you, at this point, would share with all of us your personal feelings on the death penalty and then, secondly, your ability or inability to serve on this type of case, if you're called upon, as a juror?

A Well, I believe in the death penalty if a person is found guilty in a capital murder case. For me to arrive at that decision would not be easy. It would be a very heart-felt decision and something that I would not come to easily. But if I believed the Defendant was guilty of the crime, if the evidence was presented and I found him guilty, then—the degree and seriousness of the crime, then I could give the death penalty, but it would not be an easy decision, but it's one I could make.

Q Let me ask you this: I gather from what you're saying that you feel the death penalty is proper under certain circumstances?

A Yes. I don't believe, like I said, in an eye for an eye, but you also have to look at the crime itself.

Q I gather from what you're saying that you think it should be reserved for very

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[86] DENNIS W. MERRELL,

called as a jury panel member, having been duly' sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Mr. Merrell.

A Good morning.

Q Let me begin, by reintroducing everyone here at the counsel table. My name is .Paul Macaluso. To my immediate left is Jim Nelson.

MR. NELSON: Good morning.

Q Mr. Merrell, you may recall yesterday when we were all introduced to you, there was another gentleman seated over here and his name is Norman Kinne. He will actually be presenting the evidence on behalf of the State of Texas, if you're a juror on the case, but Mr. Kinne, Jim and I—actually it's Norman. I call him Mr. Kinne. We're assistant district attorneys in Dallas. We're assistants to Henry Wade and we've been designated as the lawyers to represent the State of Texas in this

* * * *

[90] case, okay?

A Okay.

Q So, relax, if you have a question, ask it. If there is a statement that you wish to make at any time, make it, okay, whether I'm talking to you or when I'm through and the other lawyers are talking to you.

Now, let me just tell you what our position is at the outset here, that is the State of Texas. The Judge foreshadowed some of this yesterday, but I want to make our position completely clear, all right?

A Okay.

Q We, that is the State of Texas, are actively seeking the death penalty in this case for this Defendant. We make no bones about it. We want you to know what our position is based on the evidence at the very outset. In other words, we intend to be able to provide you, if you're a juror on this case, as well as eleven others, with both the type of and the quality of evidence that would convince you beyond any rea';onable doubt that that man is guilty exactly as he's been indicted and charged in this indictment. [91] That's done in the first part of the trial. In the second part of the trial, once again, we intend to provide a jury with the type and the quality of evidence that would convince them beyond any reasonable doubt whatsoever that all of the questions that will be submitted to the jury in the second part should be answered yes, which you know automatically results in a sentence of death.

MR. WEST: Your Honor, I'm going to object to the improper voir dire pursuant to Article 37.07, subsection G, wherein the code is very specific and I think it should be taken up outside the presence of this juror.

THE COURT: Okay. Mr. Merrell, let me ask you to go out in the hall for just a moment, sir, while we resolve this law question.

(Whereupon, Mr. Merrell left the courtroom, after which the following proceedings were held.)

* * * *

[94] MR. MACALUSO: I don' t believe I did. I never have, Judge.

THE COURT: They may be told what the effect of an agreement is either way or, I should say, a failure—if they vote no, then a life sentence would result. I understand your objection, but I'll overrule it at this point.

MR. WEST: Note my exception.

THE COURT: Bring Mr. Merrell back, Bob.

(Whereupon, Mr. Merrell returned to the courtroom and the following proceedings were held.)

THE COURT: Go ahead, Mr. Macaluso.

Q I've almost forgotten where we left off. I believe I was just telling you basically, Mr. Merrell, what ovr position is in this particular case. I said our position, of course, would have to be based on the evidence. [95] I just wanted to tell you what our position is at the very start of the trial; that we are actively seeking the death penalty in this particular case. Ultimately, of course, it's entirely up to the jury to make that decision.

Now, first, we have this questionnaire that you've completed and that, as the Judge said, saves us a great deal of time. Before we go any further than just my preliminary remarks, let me just ask you—I know you've already answered this in the brief time that you had and in the brief space that you had, but would you share with us at this point, number one, your personal feelings with regard to the death penalty or capital punishment and then, secondly, your ability or inability to actually serve or participate in making a decision on this type of a jury?

A Okay. My personal belief on the death penalty is that it does serve a place in this society. I think it is taken care of by the majority of the people that have made this a law and I go along with that being part of this society. What was the second part of your question, again?

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[104] DONALD J. HAMBRICK,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Hambrick. Let me begin by reintroducing everyone here at the counsel table. My name is Paul Macaluso and to my immediate left is Jim Nelson.

MR. NELSON: Hi.

Q You may recall that we were introduced to you, along with Norman Kinne, who was seated right here. He will actually be presenting the evidence on behalf of the State once the trial begins. Norman Kinne, Jim Nelson and I are all assistant criminal district attorneys here in Dallas and we've been designated as the lawyers to represent the State of Texas in this particular case. Now, to Jim's immediate left is Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Hambrick.

MR. HAMBRICK: All right.

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[107] feelings about the death penalty, capital punishment, all sorts of things, to answer up in front of a bunch of strangers, it might be a little bit inhibiting.

A Yes.

Q So the law allows us to talk to you in this relative degree of privacy. We want you to, as the Judge said, relax as much as you possibly can. Of course, bear in mind that there are absolutely no right or wrong answers to any of the questions you're going to be asked here. Just tell us how you feel. We're going to rely, to a large degree, on you, also, to just tell us, if there's something about your background or your feelings about this type of case that we need to know about, in fairness to both sides, okay?

A Okay.

Q If you have a question, by all means ask it at any time. I know I speak for the other lawyers when they talk to you, as well. If there is something that you would like to tell us about it, just tell us, okay?

A Okay.

Q Now, let me tell you right off [108] what our position is with regard to this case. Mr. Hambrick, I want you to know from the very outset here, so it comes as no surprise to you if you're selected as a juror, that the State of Texas is actively seeking the death penalty in this particular case for this Defendant. We're not trying to hide the ball or trying to surprise you later on, if you're on the jury. That's our position. In other words, we intend to be able to provide to you and eleven others, if you're on the jury, both the type as well as the quality of evidence that will convince you beyond any reasonable doubt whatsoever that that man is guilty exactly as he is charged in this indictment.

Then in the second part of the trial because the trial is divided into two parts, once again provide you and the other jurors with the type and the quality evidence that will convince you beyond any reasonable doubt that those questions should be answered yes. You know, if they are all answered yes, whether there be two or three questions, then the law requires the Judge to assess a sentence of death. It's automatic and [109] the Judge has no leeway in it. Do you understand that?

A Yes.

Q Okay. Now, that's our position and I'm sure they have a different position. I'm confident of that. Ultimately, of course, it doesn't matter what our position or their position is. It matters what the jury decides on the basis of the evidence. Am I making myself clear?

A So far.

Q Now, with those preliminary remarks—by the way, let me also say one more thing. No one is going to try and talk into or out of a position. No one is going to argue with you or

quarrel with you about any honest or conscientious feeling that you have about anything.

A Okay.

Q So don't be afraid to speak your mind on any subject, all right?

A All right.

Q Now, we know you've been asked this question on the questionnaire and you have answered it, but we know you were given [110] precious little time, really, on a pretty weighty subject. Let me ask you if you would share with us at this time, sir, once again in your own words, how you feel generally about the death penalty and capital punishment and then your ability to serve and actually participate in this type of a case as a juror?

A Okay. Like I said on my questionnaire, you know, I believe, if somebody takes a person's life, based on—if I'm a juror, based on the facts—you know, if it comes to the point that the death penalty is the proper punishment, then that's what he or she will get.

Q I gather from what you're saying that you do believe the death penalty has a purpose or serves a purpose in our society. How do you view it in that regard; do you think it serves a particular purpose or fulfills a particular need?

A It fills a particular purpose.

Q flow do you view that? In what particular manner? Like some people say, well, it acts as a deterrent, you know, maybe gets people who might be thinking about committing a

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[130] who you are and where you live." That might not be an excuse to murder, but you can see, if I hadn't said that, maybe Mr. Nelson wouldn't have shot me. Do you see?

A Yes.

Q Okay. Even though it's provoked doesn't mean you automatically answer the question no. You decide whether or not there was provocation and was it reasonable or

unreasonable because of the person's death. Do you see? You might say, I don't care if he said he could identify him. That's unreasonable for him to kill him, in which case you answer the question yes. Do you see what I'm getting at?

A Yes.

Q It's a little bit confusing, but if it's unprovoked, you answer the question yes and again, as I said earlier, you may not even receive that with those questions. Do you have any questions at all about the three questions?

A No

Q Okay. Let's shift out thinking for just a second here and shift away from what we've been talking about, capital murder, and [131] go back to murder. There's a situation that could arise and I'm not suggesting that it would arise in this case or any particular case, but it's a possibility that we need to discuss with you at this point. Imagine for a moment that you're on this hypothetical capital murder jury. Let's say instead of murder during a robbery, as we've alleged in this particular case, let's say the case involves a murder during a burglary which, as you know, is another type of capital murder. Let's say in the first part of the trial you were satisfied, along with the other *jurors, beyond* any doubt at all that A, the Defendant, killed B and it was murder, but let's say you had some reasonable doubt where you just didn't believe that the offense was in the course of committing a burglary. Well, you understand that we have to prove both a murder and burglary if we expect you to find the Defendant guilty of what we've charged him with which is capital murder? Do you see what I'm getting at?

A Yes.

Q We haven't done that in that [132] situation, have we?

A Not yet.

Q Okay. If that were the situation, you would have to find the Defendant not guilty of capital murder because we

didn't prove that. We didn't prove the burglary aspect. Instead, you find him guilty of what we did prove, which would be murder.

A Right.

Q Let's assume we did that. No longer, you understand, is it just automatically death or automatically life. Do you see? Instead, the range of penalty is as broad as it is for any offense under the laws of this state. Really, it's up to you as a juror in a situation like that basically to tailor the punish}lent to fit the facts, the Defendant and the crime as you decide it to be and that's all we're asking you to do. In other words, you listen to all the evidence and don't prejudge anything. If you feel, for example, that after hearing all of the evidence—and obviously you haven't heard stick of evidence thus far, have you?

A No.

[133] Q You wait over there and you listen to all of the evidence in your murder case now and, if you feel that the facts call for it and warrant it and justify it, you would have to give the minimum if you felt that was proper to your way of thinking. If, on the other hand, you heard a fact situation and you learned about the Defendant in an offense that you feel calls for and warrants and justifies and where you feel the right thing to do would be to give the maximum, you would do that? Any problem with that at all?

A No.

Q Okay. The range of penalty for murder, regular murder, not capital murder, is as low as five years all the way up to ninety-nine years or life in the Texas Department of Corrections and an optional $10,000.00 fine. Do you know of any reason, sir, why you couldn't assess a penalty somewhere within that 21 range?

A No.

MR. CUNNINGHAM: If the facts and circumstances called for it, Your Honor.

[134] MR. MACALUSO: Yes.

Q That's what I'm saying, of course, where the facts and circumstances called for it and warranted it and you—

A If they called for it, I think I could.

Q Okay. Now, I don't know if the judge covered this. I don't think he did, but a conviction, whether it be for capital murder, murder, or any other offense that I know of other than treason, I think, can be had on the testimony of one eyewitness to the crime if a jury believes beyond a reasonable doubt the testimony of that eyewitness. In other words, you can in certain types of crimes that there may only be one remaining witness, a rape case, for example. A lady that's been raped and she identifies somebody, the law says if you believe that individual, whether it be a rape case or a murder case, beyond a reasonable doubt, the person who identifies somebody, you can base a verdict on that. There is any reason why you couldn't do that, Mr. Hambrick?

A Well, I'm not going to base my—you know, my basic conviction on just one

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[152] EMILY C. WILLIAMS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Hi, Ms. Williams. My name again is Jin Nelson as I was introduced to you want to take just a couple of minutes to reintroduce everybody who is sitting here. Beside me is Mr. Paul Macaluso. If you will remember yesterday, we were introduced to you as a group and sitting right about there was a gentleman by the name of Norman Rinne. Mr. Kinne, Mr. Macaluso and myself are all assistant district attorneys here in

Dallas. We were assigned by Mr. Wade to handle this particular case and that's what we're going to do. Mr. Macaluso and I will pick the jury and Mr. Rinne is going to be responsible for putting on most of the evidence.

To my left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are

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[155] you think we can do that?

A Yes.

Q Okay. Are you starting to relax a little bit?

A Yeah.

Q Okay. Good. Now, as I've mentioned and you've heard three or four times already, this is a capital murder case and I want you to know right now up front as we, go into this that the State of Texas is going to actively seek the death penalty for this man sitting at the far end of the counsel table in this case. We feel like and we plan to present evidence to you that will convince you beyond a reasonable doubt that he's guilty of the offense of capital murder and that the three questions on those boards right there should be answered in the affirmative with a yes answer. Three yes answers there result in the death penalty under the law of the State of Texas. I feel like you have a right to know going in what we're planning on doing and what our opinion is in this case.

Ms. Williams, I noticed on your information sheet that you filled out here [156] yesterday that you answered a little bit on the death penalty your feelings, but I know you didn't have much time to think about it and you were kind of under a pressure situation at that time. I hope you've had a chance to think about it a little bit more overnight. I'm just going to ask you right now what your feelings are about the death penalty. Are you in favor of it or against it? How do you feel about it?

A I'm in favor of it.

Q Okay. You understand, I think, Ms. Williams, from the things that the lawyers have said that there are certain situations where the death penalty is deemed proper under Texas law. Number one, just a plain murder, knowingly or intentionally causing the death of another individual is not a death penalty offense in this state. It has to be coupled with certain situations. For example, it has to be the killing of a police officer or a fireman in the lawful discharge of his duty or the killing of more than one individual, which is a new law that was just passed this last year. It can also be certain situations where, if it's a killing in conjunction with a robbery

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[176] just on emotion say, well, this man deserves to die for what he did. You have to answer each of those three questions based on the facts that are brought to you. Do you feel like you can do that?

A Yes.

Q Do you feel like, if we didn't prove to you that one of those was true, you could answer it no?

A Right.

Q I think what you told us before, you're going to have to hear the evidence before you could make that decision; is that right?

A Yes.

Q I think that's all either side is goi-Ig to ask you to do, ms. Williams, is listen to the evidence and make a decision as to these facts based on that evidence, okay?

A Okay.

Q Now, there may be a situation—we don't anticipate it in this case, but there may be a situation where capital murder is not proved, but murder is proved. Do you remember I talked about if we don't prove committing [177] or attempting to commit robbery, then it's just a simple offense of murder?

A Yes.

Q The range of punishment in that case would be anywhere from five years up to ninety-nine years or life and you could assess an optional fine of up to $10,000.00. Now, in order for you to be qualified to serve as juror, you have to tell us that you could consider that entire range of punishment if the person were found guilty of murder rather than capital murder. You understand that there can be several levels or different types of murders, several different ways that a death of a person can result. Do you feel like you can consider anywhere from five years up to ninety-nine years or life for the offense of murder?

A Yes.

Q Okay. You don't have any problem with that then? If you feel like five years is called for and justified by the circumstances, you could assess that and, if you feel like life or ninety-nine years is called for and justified by the circumstances, you could assess that?

[178] A Yes.

Q Okay. Now, you understand also, Ms. Williams, that we don't have to prove to you motive or premeditation in any murder case. That's not an element in a case. You know, you watch on TV and they talk about motive or was it premeditated, so that makes it first degree murder and so on and so forth, but we don't have to prove that in Texas. We don't have to prove what the motive was for the killing and we don't have to prove any type of premeditation. Do you have any problem with that?

A No.

Q Okay. We've talked a lot about evidence and about how you're going to have to base your verdict on the evidence and obviously that's what we want you to do. You can't make a decision sitting there right now because you haven't heard anything yet. That evidence is going to come from witnesses on the witness stand and you're going to have

to judge the credibility of those witnesses. What we ask you to do there is give each witness an equal starting point. I envision it kind of like

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DAROL L. WEIGANT,

called as a jury panel having been sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXMINATION

BY MR. MACALUSO:

Q Mr. Weigant, let rye begin by reintroducing everyone here. I'm Paul Macaluso. I'm an assistant criminal district attorney along with Jim Nelson to my immediate left. You may recall that Norman Rinne was seated over here yesterday we were all introduced to you. I don't believe we've ever met. I know you work for the sheriff's office, but I don't believe we've ever met. We may have seen each other in passing in the halls.

A I've never see you.

Q All right. You know that we work for the district attorney's office and we represent the State of Texas in this particular case. We're the lawyers for the State, as you well know. To Jim's immediate left is E. Brice Cunningham.

MR. CUNNINGHAM: How are

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[203] charged with capital murder, as I'm sure you know, can receive only one of tyro possible penalties, life or death. It depends on the answers to the questions and the way the jury decides to answer them.

We are actively seeking the death penalty in this case, Mr. Weigant. That is, we intend to be able to provide a jury with the type and quality of evidence that is going to convince

them beyond a reasonable doubt that the Defendant is guilty in the first part of the trial and in the second part, provide them with the type and quality of evidence that will convince them beyond a reasonable doubt that the questions all should be answered in the affirmative, yes, yes, yes in each case, which as y-au know results in the Judge assessing a sentence of death. Now, the jury may disagree with this. That's why we have a jury up here. That's our position and I think it is only fair to you, certainly, and to anyone else who is a prospective juror in this type of a case to more or less acquaint them with or put them on notice of what our position is relative to the evidence bearing in mind naturally that it is [204] up to you and the eleven others that will be on this jury to make that ultimate decision. There will be two decision, actually.

Now, you've indicated here on question fifty-six—and there are only three lines provided there for you to express your feeling about the death penalty and then two or three other questions about whether or not you could sit on this type of a jury and you answered those. Could you share with us your personal feelings about the death penalty and your ability to actually serve on this type of a case and actually make those decisions that might result in the execution of this man right down there? How do you feel about the death penalty? I know you said you believe in an eye for an eye and you believe it's a deterrent.

A I believe that they should have the death penalty for any premeditated murder.

Q All right. You understand that's not the law?

A I know that.

Q Let me just hit on that while we're on it. There are some aspects of the law that I don't agree with and I'm sure there are

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[228] that would be true, also. You could be on a case and hear a fact situation where you personally don't think that individual ought to receive—you know, if you could vote directly, you would say, "I don't think that person ought to get the death penalty.", but when you come to analyzing the evidence, let's say it does fit, the evidence actually fits those questions like a glove, each one of them was proven to you beyond a reasonable doubt to be yes. Do you see that would be contrary—

A I would have to answer yes.

Q Even though you personally desire a life sentence, if you could do it that way?

A If they were all yes. It would have to be yes or I couldn't.

Q Well, you would be guided by the evidence as to whether it called for a yes or a no answer?

A Yes, sir.

Q Let me shift gears here for one second. I know the Judge is looking at me and I don't blame him because I'm going over my time limit. Let's shift our thinking for one second to two matters. One is a situation here [228] where, if you're on this imaginary jury, let's say you have heard all the evidence in a capital murder case and let's say it's murder during a burglary, all right? Let's say you're satisfied that A killed B and there's no doubt about it, but let's say you didn't hear any evidence about the burglary at all or you had a reasonable doubt about that, all right? You understand for you to convict someone of capital murder, we have to prove both aspects of capital murder, both the murder and the burglary?

A Yes, sir.

Q All right. We didn't prove the burglary, did we?

A No, sir.

Q All right. So you can't convict him of capital murder. Instead, you convict him of what we did prove, which was what?

A Murder.

Q If you did that, then you forget about mandatory life sentences or death. It's a first degree felony murder and all the law expects you to do in a situation like that, in a murder case, is to be open-minded and do [230] what you've told us you would do already and that's simply say, "I will listen to all of the evidence in a murder case and, if it's a proper case, after I've heard the evidence, that I feel calls for a particular type of punishment to my way of thinking after I've heard all the evidence, then that's what I will give. If it is what I think calls for the minimum, I'll give the minimum. After I've heard all the evidence, if I think it is proper and just and the right thing to do to give the maximum, I'll give the maximum, whatever it may be. Can you do that?

A Yes.

Q Now, you know that the range of penalty for murder is as little as five years up to ninety-years or life. You don't have to imagine a case that would call for five years or one that would call for ninety-nine years or life, but are you able to tell us that, if you see a fact situation in a murder case that, to your way of thinking, calls for the minimum, you could give, five years in the Texas Department of Corrections for murder? If you see one that calls for ninety-nine years or [231] life, you could do that as well and even add on a $10,000.00 fine? Can you do that?

A Yes, sir.

Q In other words, you will wait until you hear all the evidence?

A Yes, sir.

Q One other thing and then I'll let the other lawyers talk to you. Obviously, we discussed earlier that you are a sheriff's deputy. I anticipate that there will be other law enforcement officers testifying. You do not apparently know or think you know any of these? You understand that the law expects any juror to judge any witness by the same yardstick regardless of that witness' station in life, occupation, the color of their clothing, color of their skin or anything else?

A Yes, sir.

Q Can you do that?

A Yes, sir.

Q In other words, you know as well as I do. You've worked with law enforcement officers and you know they're capable of telling the truth and, I guess, some of them are capable of lying because they're just human

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[273] RODERICK R. BOZEMAN,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Mr. Bozeman. Mr. Bozeman, let me begin by reintroducing everyone here at the counsel table. My name is Paul Macaluso and to my immediate left is Jim Nelson.

MR. NELSON: Good morning.

THE WITNESS: Good morning.

Q You may recall being introduced the other day to Norman Kinne. He was seated over here to—it would have teen your far right at the time. The three of us are assistant criminal district attorneys here in Dallas and we work for Henry Wade who, I'm sure you know, is the district attorney. We've been designated as the lawyers who will represent the State of Texas in this particular case.

Now, to Jim's immediate left is Mr. E. Brice Cunningham—

[274] MR. CUNNINGHAM: How are you?

THE WITNESS: Good morning, sir.

Q —and to Mr. Cunningham's immediate left is Mr. Royce West.

MR. WEST: Good morning, sir.

Q You may also recall being introduced to them. They are the defense attorneys who have been appointed by His Honor Judge McDowell to represent the accused Defendant in this case. His name is Thomas Joe Miller-E1. He is at your very far right in the powder blue suit.

The reason why I've taken the time to reintroduce you to everyone here is to let you hear our names again. I want to ask you if you recognize any one of us or have heard of any one of us other than common introductions?

A No.

Q Okay. Of course, I also did that to reacquaint you with the roles that we are playing in this particular case.

Now, as you know, at this [275] particular point, Mr. Bozeman, you are a prospective juror in this capital murder case. Mr. Miller-H1 is charged by indictment with the offense of capital murder, the most serious level of offense under the laws of this state. That is, it's serious because of the nature of the offense, of course, capital murder, and it's serious because of the two possible penalties a person can receive if he or she is convicted of this offense. Okay?

As you well know, if a person is convicted of capital murder, they can receive either only a sentence of death or a sentence of life. Because of that, the law basically allows us to talk to you individually such as we're doing now.

Have you been down here on jury duty before?

A No, I haven't.

Q If you had, and you had been called on in any other case other than a capital murder case, the lawyers would have an opportunity to talk with you and ask you certain questions, but the conversation that you would have with the lawyers

would have been [276] conducted while you would be sitting out there in the gallery much as these people are and as much as you were on Monday. The answers you give would be the answers you would give in the presence of forty or fifty virtual strangers. All right?

A Yes.

Q You can see how it might kind of make you a little bit nervous or inhibit you or not relax you as much as we want you to be, so they let us talk to you individually because it's a little bit more quiet. I imagine, after a period of time, some of these people will—won't be out there and we will be a little more relaxed. Let me invite you to do that, relax as much as you can, and take a deep breath if you're a little bit nervous.

Let me remind you of something that the Judge said earlier. There are no right or wrong answers to any of the things we're going to be talking about. You're not here to please anybody and no one is going to argue with you or quarrel with you about anything or talk you into anything or out of anything. Your feelings, your impressions, and [277] your position, basically, are the things we're going to talk about and are the most important right now. We want to know how Mr. Bozeman thinks. It doesn't matter what we think. We want to know how you think, okay?

A Yes.

Q If you have a question about anything, Mr. Bozeman, by all means ask it because this is the time that you get to do that, all right? If there's a statement you would like to make or something you feel that you need to tell us in fairness to both parties here, then by all means do that, too. Will you do that?

A All right.

Q Okay. Let me tell you what our position is right from the outset here. Sir, we are actively seeking the death penalty in this case for Thomas Joe Miller-E1. I want to let you know that from the very outset so you know exactly where we stand

and what our position is going to be with- regard to the evidence that is presented. We are actively seeking the death penalty in this case and that means that we intend to provide a jury, once [278] it's selected, with both the type and the quality of evidence that will convince them beyond a reasonable doubt that the Defendant is guilty just exactly as he's charged.

Then in the second part of the trial where the punishment is determined, either death or life, we once again intend to be able to provide this jury with the type and the qualify of evidence that would convince them beyond any reasonable doubt that these questions that make that determination should be answered yes.

You know that three yes answers or all yes answers, that equals an automatic and mandatory sentence of death. Now, that's why I'm just telling you from the very outset, as we're going to tell all the prospective juro-s, what our position is so it wouldn't come to you as any surprise if you're actually on the-Jury.

You understand that, ultimately, it's the jury's decision, not our position or their position, that really counts. Okay?

A Yes.

Q Now, Mr. Bozeman, I know you've been asked this question here on the [279] questionnaire and, as the Judge said, this saves us a great deal of time because otherwise, we would probably have to ask you all these questions and tie you up for much longer than you would want to be tied up. Let me ask you at this point if you would share with us, sir, in your own words, your feelings generally about the death penalty and capital punishment and how you personally feel about it and then, secondly, if you would share with us your feelings about whether you could actually serve on this type of a jury?

A Well, as far as the death penalty is concerned, I think it would, you know, depend on the circumstances involved in what happened, you know, whether I could say I would actualli vote for that or not. Yes, I think I could, but, you know, I don't really know at this point. I'm sure I could, but as far as the death penalty is concerned, I would have to know, you know, the circumstances surrounding it.

Q Let me just ask you, as a general proposition, how do you feel about the death penalty? I understand what you're saying, it [280] would depend on the facts and circumstances, but as a general proposition, how do you view the death penalty, how do you feel about it? I mean, do you think it serves a purpose in our society? Do you think we ought to have it?

A Yes, it does.

Q What sort of purpose do you feel it serves?

A Well, I think if there's no possible way to rehabilitate a person and he is harmful to society, you know, the State has that right, I feel.

Q You said, if there was no possible way to rehabilitate somebody. Let me ask you: What would be some indication to you, Mr. Bozeman, that someone was beyond rehabilitation?

A Oh, I would say somebody mentally disturbed or something like that or say a Manson type or something like that.

Q Would, for example, repeated criminal violent conduct be some indication to you, sir, that the person was beyond rehabilitation?

A No, not really, It would, I [281] guess, depend on the extent of the crimes that he has committed and if they were, you know, violent crimes over a period of time, different—yes, I believe that it would.

Q In other words, if you see a pattern developing, let's say, in a person's life where he tends to commit violent offenses when released into society, do you feel that is the

type of person that you would be able to decide is perhaps not even worthy of or capable of being rehabilitated?

A Yes.

Q Now, let me set out a proposition here. I hesitate to do this because I don't like to pidgeonhole you, but sometimes it serves a purpose. With regard to the death penalty, we've found basically that we could probably categorize people generally speaking in three categories, and in no particular order. Let's say a type of individual who believes in the death penalty and also believes—knows himself well enough to know that they could actually serve on a jury and, if the situation called for it, could actually make a decision that would result in someone [282] actually receiving the death penalty. They believe in it and they could actually implement it, in other words, on a jury.

Let's say another class of individual, again in no particular order, believes in the death penalty as a proposition, but let's say when it comes to them actually serving on a jury, because of their personality or their temperament or whatever it may be, whatever the fact is, they just don't feel they could actually be the one to do it, could actually make the decision. They agree with it when they read about it in the paper and they agree with the philosophy, let's say, but they couldn't actually serve on the jury.

Let's say there's another class that doesn't believe in the death penalty and could never serve. I gather you're not in the third category, but do you see yourself either one of the first two?

A Oh, probably more the second group, I guess.

Q All right. We need to talk about that just a little bit. Mr. Bozeman, let me explain something here so it doesn't sound like [283] I'm rattling on endlessly and covering the same thing repetitiously. When we talk, no matter what we're talking about, and I'm asking you questions and you're answering, you're really talking to everyone here. You're

certainly talking to the other lawyers and you're certainly talking to the Judge and, of course, to the court reporter who is taking down everything in this case for appeal purposes, okay, so it's necessary, legalistically speaking, that I ask some things and you'll say, "Why does he keep asking that?" or "Why does he keep going over that? He's repeating himself." or "Haven't I made it clear?" You may well have, but the law simple requires that we go into very tedious and minute detail on some of these things. The lawyers are already tired of hearing me talk and I know the Judge is, but it's really more important that you talk. When I ask you questions, it's very important that you—I don't know how to put this delicately—not equivocate in your answers. If you *can* answer something yes or no, that's certainly the best way. Okay? I'm not trying to force you to answer, but do you [284] understand that it is very difficult for the Judge to make certain decisions in regards to a juror's service if someone says, "Well, maybe I could." or "I probably could." or "I possibly could." Do you see what I'm getting at?

A Yes.

Q Now, I'll give you all the time you need to think about any answer that you're going to give, okay?

A All right.

Q I know it's kind of confining, isn't it, but it's just necessary. All right?

A All right.

Q Now, you said that you see yourself fitting more into that second category. Is that because—we've already discussed how you feel about the death penalty. Is it because of your possibly serving or hesitance to serve on the jury itself, or just what is it?

A No. It would be actually the weight of, I guess, thinking about the death penalty and that would be the real thing behind it, I guess. I wouldn't have any problem serving on the jury, I don't think.

[285] Q You think you would have some problem?

A No, I don't think I would.

Q Oh, you don't think you would. Okay. Well, here's the thing. We have to rely—every one here has to rely on every thing you tell us and when you say—again, when you say probably, I know that's probably how—you see, I just said it there. I guess that's how I would answer the question, too, if I had some reservations, but every one here has to rely now on what you're going to do, within the law, of course, and based on the evidence back when you're on the jury. It would be terribly unfair to either or both sides, if some prospective juror said, "Well, maybe I could do this," or "Maybe I could do that," and then to find out later on that person couldn't do that, you know, under the law, follow the law, when they're actually on the jury. We've got to rely now on what you say. Are you saying that you feel you could?

A Yes, I could.

Q All right. Again, I want you to understand that I'm not trying to talk you into [286] any position, okay?

A No.

Q So you feel that you actually could serve on this type of a jury?

A Yes.

Q And understanding now that 'in years past with regard to the death penalty—I think you know and it's common knowledge that for many, many years—I say many, many years, ten or fifteen years, maybe more than that—no one was executed, I believe anywhere in the United States for about ten or fifteen years even though death penalties were handed down—

MR. CUNNINGHAM: Your Honor, we'll object to that. What the law was ten or fifteen years agohas no relevance to what we're doing right now.

THE COURT: I'll overrule, Mr. Cunningham. I think you're making a good point, though. Overruled.

Q The point I'm trying to make is, we would expect, as I'm reasonably sure you [287] understand at this point, if a verdict were to result in this case of a sentence of death, a juror should realistically expect now in 1986, that that sentence would be carried out, whereas years ago, you might have been on a jury and said, "Well, they're not executing anybody. You know, we're getting death penalty cases and hand down a verdict, but no one is being executed." You know, it's kind of like who cares or what's the difference, he's never going to be executed.

Do you understand that you should reasonably expect that, if you were to return a verdict that resulted in the death penalty, Mr. Miller-H1, in this case, would be taken to Huntsville, Texas at some point in time and given a lethal injection and executed under the law. I think you understand that, do you not?

A Yes.

Q I mean, the seriousness of the situation?

A Yes, sir.

Q Knowing that, do you feel you. still could serve on this type of a case?

A Yes, I could.

[288] Q All right. Now, let's talk a little bit about capital murder. You understand, when we talk about murder, the offense of murder is part of the offense of capital murder. Let me explain that. We have an offense known simply as murder under the laws of this state. Murder is a situation where one person, knowingly or intentionally, causes the death of another individual and that's done without any legal excuse or any legal justification, murders—murder all right? But not all is not a capital offense. You can't receive the death penalty in Texas just for murder. Am I making myself clear, Mr. Bozeman? To be eligible for the death penalty, you must

commit murder under a certain set of circumstances or you must murder a particular class of individual. I'm sure you know some of what I'm talking about.

For example, if I murdered – if you murdered me outside in the hall here because we get in an argument, you couldn't receive the death penalty for that or vice versa, if I killed you. All right? Now, if I was a police officer or a fireman in the line [289] of duty, that's a capital murder. Do you see what I'm getting at—

A Yes.

Q —or if you kill a jail guard or you kill someone while you're escaping from a penal institution, a jail or penitentiary, things of that nature. If you kill a number of people in one episode, that's a capital murder. If you kill someone for hire, it's capital murder. if you commit murder also in conjunction with the commission of another very serious felony, such as we've alleged here, murder during a robbery—in other words, murder plus, murder during a burglary, murder during a rape, arson, kidnapping—do you see what I'm getting at?

A Yes.

Q Murder plus. We have to prove both the murder and the aggravated offense, robbery, burglary, rape and so forth. Then murder, which is a first degree felony, is then elevated up the level of a capital offense for which you receive only the death sentence or a life sentence depending on certain factors.

Now, let me ask you: How does that square with your way of thinking, sir, [290] generally of what a death penalty case ought to be, depending upon the facts? Do you think those are the types of offenses that you feel, depending on the facts and circumstances, the Defendant's background, the way the crime was committed—do you feel those are the types of cases that the death penalty ought to be in order for or would you add to that or subtract from it, would you modify it in some way?

A No, I would say yes. Yes, those are the offenses.

Q Okay. Would you add to that? I know you've given it some thought, but do you think you would add something to it? Some people say, "Well, they ought to get the death penalty for sexually abusing little kids.", you know, at least the possible death penalty for it, maybe not in all case, but it ought to be available, or selling dope and getting little kids hooked on heavy dope or beating up and abusing old people and stuff like that.

A I don't believe those should be.

Q Okay. Would you pretty much limit it the way it is?

A Yes, I would.

[291] Q All right. Now, you understand that the trial of a capital murder case is conducted pretty much in the same fashion as any other case, any other criminal case. That is, it's conducted in two parts. The first part deals only with whether the person is guilty or not guilty. The State has the burden of proof. We must convince you beyond a reasonable doubt that the Defendant is guilty, in which case, you find him guilty. If we don't prove that, you find him not guilty. It's as simple as that. If you find him not guilty, the trial is over and everybody goes home. If, on the other hand, you're convinced beyond a reasonable doubt that the Defendant is guilty of capital murder as he's charged here, then we go on with the sec'.)nd part of the trial. You may hear additional evidence to aid you in the second part of the trial and you may not. Either side or both sides can bring you additional evidence, but no one is under any obligation to bring you any additional evidence. You may be in a position where you would decide the answers to the questions, which we'll talk about in a minute, on the [292] basis of the evidence that you received in the first part of the trial because the law does allow you to do that.

Now, the second part of the trial, under the old law, up until about fifteen years ago, I guess it was, or somewhere around there, after the jury heard all the evidence, the jurors

would go back and actually directly decide should a person get the death penalty, should they get a life sentence or should they get some number of years. If that's the way you felt and you felt, on the basis of the evidence, that someone ought to die and all the other jurors agreed agreed, you wrote in death or life or some number of years, okay?

Now, that changed about some fifteen years ago—maybe not that long ago. Instead, you don't make that decision directly. You make the decision indirectly on the basis of the answers to three questions that you're called upon to answer and, you see, the law requires the Judge to take an automatic and mandatory course of action. Am I making myself clear?

A Yes.

[293] Q I think the Judge explained this rather adequately the other day, but I just want to go over it again. You understand that it boils down to this: Just as we had the burden of proof in the first part of the trial to convince you that the Defendant is guilty and, if we proved that, you unanimously found the Defendant guilty, the same thing holds true for the second part. We have the burden of convincing you, since we're seeking the death penalty, that those questions should be answered yes. If we do, your oath as a juror will require you to answer the questions yes which you know, three yes answers or all yes answers, means an automatic sentence of death. Judge McDowell has no power under the law to override or change your verdict. You write a letter to him, basically. Three yes answers is automatic death. He can't say, "Well, I disagree with you. I'm going to give him a life sentence."

The same thing would hold true if you answer one or more of the questions no, an automatic life sentence. Whether the Judge agrees or disagrees, it doesn't matter. He [294] will follow that particular order that you give him based on those answers. Okay? Any problem with that procedure?

A No.

Q Okay. Now, let's look at the questions very briefly. Take whatever time you need, Mr. Bozeman, to look over those questions and we'll talk about them in just a minute.

A (Juror complies.)

Q Did you get a chance to read all three of them?

A Yes.

Q Did they cause you any problems at all or do you have any questions about any of the three questions?

A No.

Q Do you understand, as I said earlier, that we have to prove those to you. We have to bring you evidence or there has to be evidence presented during the trial that would convince you that those questions should be answered yes beyond a reasonable doubt?

A Right.

Q Is there any reason why you couldn't—allowing that I cannot go into the [295] evidence of this particular case. We're just talking in generalities, sir. Is there any reason why you couldn't answer that first question yes or no depending upon the type of evidence you received, you know, whether someone acted deliberately with the reasonable expectation that the death of somebody would result? Any reason why you couldn't answer that question yes or no?

A No, there's not.

Q Can you see that the type of evidence you would probably need to receive to answer that question would be given to you in the first part of the trial when you learn about how the offense was actually committed and what role the Defendant had?

A Yes.

Q Okay. Question number two, does that cause any problems at all? That kind of looks toward future behavior, doesn't it—

A Yes.

Q All right.—you know, is there a probability that he would commit some criminal acts of violence that would constitute a continuing threat to society. Do you think [296] that question can be answered? Well, let—

A Yes.

Q —me put it this way: You know it can—you think it can?

A Yes.

Q What sort of evidence do you feel would be valuable to you? If you could just tell us, what do you think you would want to know about somebody that would aid you to answer that question yes? What would be the most valuable to you?

A I would probably want to know what he's done in the past and the degree of violence that was involved in those acts.

Q Do you think that would aid you?

A Yes.

Q Do you think, of course—and it's probably reasonable that what you learn about what he did during the actual commission of the crime, actually before the crime in preparation for it, during the crime itself, and then maybe how he reacted afterwards?

A Yes.

Q Do you think that's a pretty good barometer sometimes, how a person reacts after [297] a crime, either remorseful and contrite or are they just kind of nonchalant about it and couldn't care less?

A Yes.

Q Do you think that kind of gives you some insight into what type of person you're dealing with and what—you mention this thing earlier about rehabilitation. You will notice that there is nothing in any of these questions about rehabilitation?

A No, there's not.

Q All right. Do you understand that you're bound, just like we're bound, by these three questions? Do you feel that

your personal feelings about rehabilitation would interfere in any way with the answers to those questions or do you feel number two maybe looks towards rehabilitation, although it doesn't use that word rehabilitation or rehabilitate?

A I guess it's like you were saying. It would depend on the demeanor of the person, you know, that actually committed the crime, whether he would actually—or there was a chance for him to be rehabilitated or not.

Q All right. You said earlier, if [298] you thought there was a chance that someone could be rehabilitated, you didn't think they should receive the death penalty?

A Right.

Q Let me just ask you—and I don't mean to play word games with you because a lot of times it sounds like that's what we're doing, especially these questions. You see, the Judge can't further define these questions for you. He can't give you any guidelines and neither can I, for that matter.

A Right.

Q He certainly would be in a better position, but he can't. The law does not permit him to do that and the lawyers can't, either.

A Okay.

Q But do you feel your feelings about rehabilitation would in any way conflict with your answering that question, number two?

A No, I don't think they would.

Q Now, number three is a question that may or may not be given to you it depends on whether or not some evidence is raised by any kind of provocation. Can you see [299] how that question could be answered yes or no depending on the type of evidence you receive?

A Yes.

Q Let's shift gears for just a second and let me back up on one thing. Do you remember what I said, years ago in a capital case, the jury was actually expected to express their own opinion as to whether or not somebody should live or

die. You know, if you had a particular feeling, as you sat over here and listened to the evidence, he let you voice that, "I think that guy ought to die." or "I think or "I think he ought to get life." or "I think he can be rehabilitated.", whatever the case may be. Do you understand that you can't do that now?

A Yes.

Q The law expects that these three questions be inserted between you and the Defendant in a death sentence or a life sentence, that you put aside your personal feelings and be rather—I hate to use the word. It may be inappropriate, but—pretty scientific, I guess, just look and see if the proof is there, if it measures up, [300] measures up to an answer beyond a reasonable doubt. If it does, answer the question yes. If it doesn't, you answer the question no, regardless of your personal feelings. Can you see—I'm not saying that this would ever occur, Mr. Bozeman, but can you see how you might be on a jury and you might have a personal desire after you heard the evidence, personal desire that the person would die or a personal desire that the person should receive a life sentence? But yet, you see, when it comes time to answer the questions, let's say if you're intellectually honest with regard to answering the questions—let's say you're on a jury and you say, "Well, I think the guy ought to die after I've heard this. This is horrible. I think the guy ought to die. It scares me, the thought of him being out on the streets again." But then you look at question one or two or three and actually, in all honestly, you say, "Well, as much as I want it done, the proof is just not there in all honesty. I'll have to answer one of those questions no." Could you go ahead and do that knowing it would result in a life sentence and [301] not a death sentence?

A Yes, I could.

Q Let's flip that over. How about in a situation where you're on a jury and you say, "Well, this is a capital murder technically, but I don't think this is the type of capital murder that someone ought to die for." Yet, on the other hand, when

all the evidence is in, you see that those three questions, beyond any reasonable doubt, should be answered yes, knowing full well that will result in the execution of somebody who you personally don't desire to be executed—do you see what I'm getting at?

A Yes.

Q Could you go ahead and do that, in all honesty?

A I don't know. I would like to think I could, but I don't think I could. If I didn't feel like he deserved it, I don't think I could go for the death penalty.

Q Okay. We need to pause here for just a second because, obviously, you can see how crucial and critical that is to all of us here. I said, I'm not going to yell at you or [302] quarrel with you or try and talk you into or out of anything. I want to make sure you understand that. I think you're being honest with us and I know you've given it some thought. I just want to be sure. As I said earlier, we're going to have to pin you down on your position. And bearing in mind that I believe you have given it some thought since you were down here on Monday—you have, haven't you?

A Yes.

Q All right. I believe you just told us, that if you were in a situation where you had a personal feeling that a person -- you know, we know you're not a robot. We know that, when you sit over here, you're a human being and you're prone to having personal opinions about certain evidence or the desire of a particular situation. Are you saying, that if you, in all honesty, were on a jury, on a hypothetical jury, and you, in your heart, felt that person should not die, yet when you went to answer these three questions, even though, let's say, intellectually there was proof to satisfy you, number one, beyond any [303] reasonable doubt, he acted deliberately and with the reasonable expectation that someone would die, you would have to answer that question yes, and as far as number two, as much as you didn't want to answer that one yes, you would say, "Yeah, I want to be honest about it. I think there's

a probability he probably would commit some criminal acts of violence, in which case the law would expect you to answer the question yes, and let's say, in number three, there's no provocation, the poor victim, he didn't do anything to provoke anybody, I'd have to answer that one* yes, yet when it comes down to looking at those three questions and knowing that yes, yes, yes, is the same as writing death, you understand that the net effect is the same and that's contrary, completely contrary to what you desire, in honestly, Mr. Bozeman, if you're kind of gut-wrenching about it now, as we sit here now, knowing what kind of pressure would be on you—

MR. CUNNINGHAM: Your Honor, we'll object to that last statement. There's no indication and there's no evidence and it's [304] outside the record and it's speculating on whether or not that would be any pressure.

THE COURT: I'll overrule. I'll let Mr. Bozeman make up his mind on that. I think he's answered all the questions I've heard so far very thoughtfully and intelligently, Mr. Bozeman. if any question posed by a lawyer doesn't seem understandable to you, don't hesitate to say so. I'll overrule the objection, Mr. Cunningham.

Q Do you see what I'm getting at? You're not under the same kind of pressure, reasonab11, that anyone would understand would be on the situation when you're making a life or death decision back in the jury room with eleven other people. Do you really feel you could put aside your personal feelings or, as you said earlier—you said you didn't think you could?

MR. CUNNINGHAM: Your Honor, we'll object to that last [305] statement. He's gone through those three questions and he said he could answer yes if the facts and circumstances proved beyond a reasonable doubt that the answer should be yes. He said that several different ways.

THE COURT: I'll overrule, Mr. Cunningham. I'll let him answer the questions. You might want to reask it, Mr. Macaluso, to make sure it's clear to Mr. Bozeman. I think he said a moment ago that he might have some problems with it because he would be hesitant about someone receiving the death penalty.

MR. CUNNINGHAM: Your Honor, I would hope that every juror.. that was sent over there will have some problems with it. The issue is, if he hears the proper facts and circumstances beyond a reasonable doubt, that the answer should be yes to number one that he would [306] do that. The same thing for number two and the same thing for number th e.

THE COURT: I agree. With that statement of law, I'll let Mr. Macaluso reask the question, if he wants to, in case Mr. Bozeman needs to be refreshed.

Q I can barely remember the question. I think it came down to, you said that, if you felt one way, but the proof was another way—

A I'd have to vote with the proof, you know, no matter how I felt. If the answer was yes, then I would have to put yes no matter how I felt about it.

Q Let me shift gears here away from, what we call—we've talked about capital murder and mandatory life or death—and talk about a situation that I'm not saying would necessarily occur in this case or any other case, for that matter, Mr. Bozeman, but we need to discuss it now because we have the opportunity.

Imagine for a second that you're [307] on a capital murder jury and let's say it's a capital murder that is allegedly a m during a burglary, let's say, because it's a type of capital murder, or it could be during a rape, I guess. Let's say that you heard all the evidence in the first part of the trial and you and the other jurors were convinced beyond any reasonable

doubt that a murder occurred. There's no doubt about it, but you didn't hear any evidence about a burglary or you have a reasonable doubt. You're just not sure about whether that burglary—it was actually murder during a burglary. Do you understand, if that were to occur, you couldn't convict someone of capital murder because the State in that case didn't prove a capital murder to you, did they?

A Right.

Q All they proved was what?

A Was the murder.

Q You got it. In such a situation you find the Defendant not guilty of capital murder simply because it wasn't proven to you, both parts were not proven to you. You find him guilty of what was proven to you and that's murder, as you've already said. Were that to [308] occur—imagine for a second that you're in a hypothetical situation now where that happened. The range of penalty for murder is altogether different. It's no longer mandatory life or death. Instead, it's the broadest range of punishment provided for under our penal code and our penal system.

Let me just ask you—let me talk a little bit about what murder is. I said earlier that murder is a situation where one person knowingly or intentionally causes the death of another individual. Okay. Let me go on to explain, so we're clear on this and you're clear on this, that that is a situation where this homicide occurs, this killing occurs, without any legal excuse or any legal justification whatsoever. All right? By that I mean, we're not talking about a situation where you believe someone acted in self-defense, whether it's, if I kill Mr. Nelson or you kill me because you think you're in fear of serious bodily injury reasonably or death—and the law gives you the right to kill me. You could be charged with murder, but it wouldn't be murder if the jury believed that [309] you acted in self-defense or I did. Do you see?

A Right.

Q Forget about self-defense when you talk about murder. The same thing would hold true for, if you believed it was an accident. Now, I could kill Mr. Nelson or you could kill somebody. It was an accidental thing. You could be charged with murder, but if the jury believed it was an accident, it's not murder. A person has to be found not guilty just as he would be if you believed he was acting in self-defense.

The same thing would hold true if you thought someone was insane. As much as people have reservations about the insanity defense, if you honestly believe or have a reasonable doubt that somebody was insane at the time of a homicide, you can't convict him of murder.

Lastly, don't be thinking about a situation where someone acts in the heat of sudden passion. As an example, somebody comes home and finds out, God forbid, that their child was sexually abused or something like [310] that happened, something bad, and he picks up a gun and goes into a rage and goes down the street and kills somebody. Do you see what I'm getting at?

A Yes.

Q That's a homicide, but that's a lower grade of homicide. That's not murder, if you believe that, if you're on a jury. Let's divorce our thinking from those sorts of things and let's talk about a situation where one person knowingly or intentionally causes the death of another. I can't give you any other examples. Let me ask you—I gather from what you said, of course, and it's reasonable that anybody would feel this way, that you think murder is a very serious grade of offense.

A Right.

Q Let me ask you: What do you personally feel ought to be the minimum punishment for somebody committing a murder, sir?

MR. CUNNINGHAM: Your Honor, we will object to the form of the question in asking this prospective juror what the minimum [311] punishment is without telling him what the state legislature has set as the minimum punishment, that being five years to ninety-nine or life.

MR. MACALUSO: I intend to do that, Judge. I'm just asking the jury what he—

THE COURT: Well, go ahead. I'll overrule the objection. I understand.

Q What do you personally feel ought to be the minimum when somebody commits a murder and it's not self-defense and not an accident and not insanity and not in the heat of sudden passion?

MR. CUNNINGHAM: Your Honor, we would still object to the form of the question. It's an improper question, the way he has asked the juror.

THE COURT: I'll overrule, Mr. Cunningham, in this particular situation. I'll overrule and say no more.

[312] A I would say twenty years, I guess.

Q You understand that in a murder case you would be allowed to consider all the facts and circumstances surrounding it, but I want you to understand that you still exclude those four different categories we talked about. Am I making myself clear?

A Yes.

Q Now, Mr. Cunningham is right that the range of penalty is, as I said earlier, very, very broad to encompass a wide variety of situations. As I said earlier, we want to know how Mr. Bozeman feels.

The range of penalty for the offense of murder is, under the law, as low as five years and all the way up to ninety-nine years or life. The law does allow the jury to consider all of the facts and circumstances surrounding the situation where a

person murders another person. It boils down to this, Mr. Bozeman, I just want to know what Mr. Bozeman's feelings are and you said that twenty years ought to be the minimum; is that correct?

A Yes.

Q Mr. Bozeman, let me ask you—I [313] can't give you a fact situation, sir, "Well, Mr. Bozeman, what would you do h would you do here?" "What if this happened, what would you do here?" That's not proper for us to do that, either side to do that. Are you saying, sir, that you would ever feel, knowing yourself, it would ever be proper under any facts and circumstances where one -person murders another person, absent of those other circumstances, to ever give a sentence as low as five years? Do you feel it would ever be proper under any circumstances?

A No, not if it was murder.

Q As I said earlier, Mr. Bozeman, it's not my position, my responsibility, or my desire to talk you into or out of a position and I think it holds true certainly for Mr. Cunningham and Mr. West when they talk to you. As I said from the very outside, we want to know how Mr. Bozeman feels. Let me just make sure we're clear on this. Are you saying that you—and we know you haven't heard any facts surrounding any hypothetical murder and we can't give you any, but are you telling us, telling the Court, telling the Judge, that you [314] do not feel it would ever be proper under any facts and circumstances, whether you can imagine them or not, to ever give as low as five years for a situation where one person knowingly or intentionally causes the death of another, no legal excuse, no legal justification whatsoever, no insanity, no heat of sudden passion, no self-defense, no accident, you're saying you could never do that?

A Yes, I could, but, like I say, it would depend on the circumstances. Say, the person who was doing the commission of the act, say he panicked and he was trying to, you know, flee the scene and something happened that caused the

death, you know, that really it was indirectly. It was his fault, but ht didn't do it with malice, then I could say, yes, probably five years could be in order.

Q Bear in mind that we're talking about a knowing or intentional act.

A Oh, no, I don't think so. No.

Q Okay. Well, you see, you said, "I don't think so." Are you saying you could or you could not, sir?

[315] A (No response.)

Q For the knowing or intentional killing of another human being?

MR. CUNNINGHAM: And he believed from the facts and circumstances of that case, that that was a proper verdict, Your Honor.

A Yes.

Q Yes, you could or you could not?

A I could.

Q You could?

A Yes.

Q For a knowing or intentional—

MR. WEST: Your Honor, this is being repetitious. We've gone over it two or three times. He's already answered the question that He could, under the proper facts and circumstances as he deemed them to be, he could give a five year sentence. This is getting to be redundant at this point.

MR. MACALUSO: Judge, I don't mean to be repetitious. I [316] did not quite understand the last response and I just want to clarify it.

MR. WEST: Judge, we can have it read back.

THE COURT: I asked him and you can ask him one more time, Mr. Macaluso.

Q Just so we're clear, are you saying you can, sir, or you cannot?

A Yes, I can.

Q Okay. I am about out of time, Mr. Bozeman, but let me simply ask you: Do you have any questions of us at all at this time?

A No. No, I don't.

Q Sir, do you know of any reason whatsoever, whether I touched on it or not, why you f eel you could not be a fair and impartial, juror in this type of case?

A No.

Q Any reason that you know of, sir, why you could not sit in judgment of a fellow human being?

A No.

Q Okay. Anything that the Judge [317] covered with you the other day that you have any questions about, in any procedure that is involved in the trial of a case such as this?

A No.

Q Any problems at work or anything like that, family schedule?

A No.

Q You're a happy single man, aren't you?

A Yes.

Q You've been very polite and very kind and open and honest with us, Mr. Bozeman, and I appreciate it. That's all the questions I have for you, sir. I know that Mr. Cunningham and Mr. West will have some questions for you at this time. Thank you, very much, sir.

MR. MACALUSO: I'll pass at this time, Your Honor.

THE COURT: Thank you, Mr. Macaluso.

[318] EXAMINATION

BY MR. CUNNINGHAM:

Q Mr. Bozeman, as the Judge and Mr. Macaluso indicated to you, my name is Brice Cunningham and, along with Mr. West to my immediate left, we represent Mr. Miller-El in this case. I'd like to ask you just a few questions concerning your questionnaire.

How long have you been at the University of Texas at Dallas?

A I've been there about six months.

Q Where were you employed before that?

A Cam Audio.

Q How long were you with Cam Audio?

A I was with them a year.

Q Are you still attending college?

A No, I'm out right now.

Q That is at Denton, the University of Texas—no, North Texas State University?

A Right.

Q Mr. Bozeman, you indicated that you read the Dallas Times Herald; is that correct?

A Yes.

[319] Q Every day?

A Yes.

Q Have you read anything that may purport to be what the facts are in this particular case in the Dallas Times Herald?

A No, I haven't,

Q If you did, you would know that you would have to put that out of your mind, if chosen as a juror on this case, and disregard that because that is some hearsay that reporters are putting in the paper. All the evidence will come from where you're seated there now and in the physical evidence?

A Yes.

Q You could do that if chosen as a juror, sir?

A Yes.

Q The same thing would apply to radio or TV?

A Right.

Q You answered yes to a question that, either you, your spouse or any member of your family or a close friend ever studied law. Who was that, sir?

A I have a cousin in Los Angeles who [320] works for the DA's office.

Q Do you communicate with your cousin in Los Angeles?

A No. I haven't for a few years.

Q Does he try criminal cases or civil cases or do you know?

A I think she's a criminal—

Q Oh, it's a she. Sorry. What is her name?

A Joleen Harkess.

Q When is the last time you saw her?

A Oh, it's been about six or seven years at a family reunion in Longview.

Q And the person that studied sociology is that you?

A Yes.

Q You also answered that you were interested in the outcome of a criminal case in Dallas County. You said yes, talking about T. Cullen Davis. That was just a passing interest as most people were at the time; is that true, sir?

A Yes.

Q And whatever you may have read or heard, either on the TV or the radio or in the [321] papers, you could put that out of your mind and, if you're chosen as a juror on this case, base your decisions totally about the facts and, evidence that you hear?

A Yes.

MR. CUNNINGHAM: Pass the juror.

THE COURT: Mr. Bozeman, let me ask you, if you would, sir, to go either in the jury room or the hall. Why don't you wait out in the hallway while we take up a law matter and we'll get you back in just as quickly as we can, one way or the other.

(Whereupon, Mr. Bozeman, left the courtroom, after which the following proceedings were held.)

THE COURT: I thought it might be better to remove the juror in case there's any discussion about what the State did

and what the defense did. Mr. Macaluso, the juror has been [322] qualified.

MR. MACALUSO: Yes, sir. We'll exercise a preemptory challenge at this time, Your Honor.

MR. CUNNINGHAM: I want to ask him one other question, Your Honor.

THE COURT: Ask Mr. Bozeman?

MR. CUNNINGHAM: Yes, or the Court can. I just want to put it in the record his race.

THE COURT: The Court will take note of the fact that he is a black male and according to the juror's sheet, he's twenty-eight years old.

In view of that, Mr. Macaluso, is the State exercising this preemptory for racial reasons or some other reason?

MR. MACALUSO: May the record also reflect that this is the first black that has been questioned by the State and the [323] defense.

THE COURT: Mr. Macaluso, I don't think the law requires the State to state its reason, but I think it is appropriate to ask you if it is for reasons other than his race.

MR. MACALUSO: No. I would state without hesitation or reservation that it is not, Your Honor. Although not required to, I would state at this time that I have reservations and I'm exercising a preemptory challenge in this particular situation because of the general answers of the venireman, Mr. Bow man, and specifically with regard to his feelings on the death penalty, his feelings and his position with regard to rehabilitative aspects of an individual charged with this sort of crime, his obvious hesitation, which is on the record, with regard to being able [324] to override bis personal feelings with regard to somebody receiving a life sentence, and that he

also said earlier that he felt the prior pattern of conduct would not necessarily be enough to convince him that a person was worthy or entitled to a death sentence, and other matters.

THE COURT: Let's bring Mr. Bozeman back in, please.

(Whereupon, Mr. Bozeman was returned to the courtroom and the following proceedings were held.)

THE COURT: Mr. Bozeman, come on back in, please, sir, if you would. Mr. Bozeman, you have been excused from service in this case, but I want to thank you and the lawyers want me to thank you for your attendance and your patience in answering these questions. You've very conscientiously answered the [325] questions and I hope you have good luck in your college career. I hope you get to finish college. It looks like you're working at it. Good luck to you.

(Whereupon, Mr. Bozeman left the courtroom, after which the following proceedings were held.)

MR. NELSON: Judge, during the last voir dire by Mr. Macaluso, Mr. West made an objection with reference to things being redundant or repetitious during voir dire. The Court has placed a time limit on us and it is our feeling, that as long as we work within that time limit, we can ask things as many times as we want to ask them. I don't think it is a proper objection and we would ask that the defense be instructed not to make that objection again in the presence of a juror.

* * * *

[332] MARY I. SUMROW, called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. Sumrow. As I was introduced to you on Monday, my name is Jim Nelson. I'm an assistant district attorney in Dallas and I want to reintroduce everybody here. Right next to me is Mr. Paul Macaluso. I think you will remember Monday that another gentleman was sitting with us at about that corner of the counsel table by the name of Norman Rinne. The three of us are assistant criminal district attorneys in Dallas and we've been assigned by Mr. Henry Wade, our elected district attorney, to handle this case for him in this court and that's what we're going to be doing. Seated to my left, immediately to my left, is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good morning.

Q Next to him is Mr. Royce West.

* * * *

[354] irate about what had happened or whatever that would take—if you felt that the person should get death, yet we failed to prove that the answer to question number one was yes, could you answer that question no?

A Yes, I could.

Q Even knowing that would result in a life sentence rather than a death sentence that you wanted emotionally, you feel you could intellectually set that aside and answer that question no because that was what the evidence showed?

A Yes, I could.

Q Okay. There's no question about that in your mind?

A No, none at all.

Q That's we're asking you to do, Ms. Sumrow, is base your verdict on the evidence and not your emotions.

A Right.

Q Now, there is always a chance in a case like this, although we don't expect it to happen, that: all will be proved will be the offense of murder. Let me give you a hypothetical example. Let's say we've got a [355] murder committed in the course of a burglary case. Let's say we prove to you that the Defendant in that case knowingly or intentionally caused the death of another individual, but we don't prove anything about a burglary, nothing about a burglary at all, then it's your duty, is it not, to find the Defendant guilty of the offense of murder?

A Yes, it is.

Q Okay. Knowing or intentionally causing the death of another individual. As I said, the death penalty is not an option in that case. The punishment range is anywhere from five years up to ninety-nine years or life and an optional fine of up to $10,000.00. Now, would you agree with me that there are—and I can't go into examples, but there are several or a multitude of circumstances under which one person could knowingly or intentionally cause the death of another individual. A multitude is about the best word I can think of of situations in which that could happen. Again, we aren't talking about self-defense and vie aren't talking about accident or something like that, but still a multitude of circumstances. [356] That's why murder has the widest range of punishment than any Texas law allows, anywhere from five years up to ninety-nine years or life.

Now, in order for you to be able to be qualified to serve as a juror, you have to tell us that you would be able to consider that entire range of punishment for murder. You don't have to tell us right now what you would assess because obviously you haven't heard the facts. You don't know what the facts are. What you have to be able to tell us is, that if, after you've heard all of the evidence you're going to hear, you feel that the facts and circumstances justify and call for a sentence of ninety-nine years, you would give it. At the other end, you have to be able to tell us that, if you feel that the facts and

circumstances, as you find them to be, justify a sentence of five years, you can give that or twenty years or forty-five years, anything in between. As you're sitting there right now, Ms. Sumrow, you don't even have to be able to verbalize to us the facts and circumstances that would justify five years or that would [357] justify life or something in between. You do have to be able to tell us that, if the facts and circumstances justified that in your mind, whatever that may take, you would assess a five year sentence if you felt it was justified or a ninety-nine or life sentence if you felt that was justified. Now, can you do that for the offense of murder?

A Yes, I could.

Q As I've said over and over again, what we're going to ask you to do is base your verdict on the evidence as you hear it and keep an open mind until you've heard all of the evidence, everything you're going to hear, before you make the decision because we want you to base your decision, base your verdict, on that evidence. I believe you're telling us you can do that; is that right?

A Yes.

Q Okay. If that evidence justifies five years or calls for five years, you will give five years; is that right?

A That is correct.

Q If the evidence calls for sixty years, you will give sixty. If it calls for [358] twelve years, you will give twelve. Whatever it is in that range, you can consider the entire range based on the law and the evidence; is that right?

A I believe that's correct.

Q Okay. Now, the law allows the Defendant to either testify or not to testify. It's his option. If he wants to testify, no one can stop him. If he doesn't want to testify, no one can make him testify. If he does not testify, you can't consider that. You can't talk about it in your deliberations and it can't come across your mind at all that he didn't testify or why he

didn't testify because he has an absolute right under the Fifty Amendment of the constitution to not testify. Do yo.u have any problem .with that?

A No, I don't.

Q If he does testify, you could judge him as you would any other witness; is that right?

A That's correct.

Q All the witnesses, basically, Ms. Sumrow, start out at the same point. It's kind of like race. Everybody starts out at the

* * * *

[392] A I do not see how it would, no.

Q Are you sure about that?

A I feel sure about it.

Q No vacation plans?

A No, sir, not until the summer.

MR. WEST: Nothing further, Your Honor.

THE COURT: Thank you, Mr. West, Mr. Nelson, Mr. Macaluso.

MR. NELSON: Your Honor, we would be very pleased to have Ms. Sumrow serve as a juror on this case.

MR. WEST: Your Honor, I guess-I'll have to concur with Mr. Nelson and we would be very pleased to have Ms. Sumrow on this case, also.

THE COURT: Ms. Sumrow,. Let me ask you—I'm going to give you an oath as a juror in this case. You have been accepted by both sides.

(Whereupon, the juror was duly sworn by the Court.)

[397] BILLY JEAN FIELDS, called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Fields. Let me begin by reintroducing everyone here so you're acquainted with everyone here at the table. My name is Paul Macaluso and to my immediate left is Mr. Jim Nelson.

MR. NELSON: Hello.

Q Along with Mr. Norman Kinne, who is seated right over here to your far right, as he was introduced yesterday. We are three assistant criminal district attorneys here in Dallas, Mr. Fields. We work for the district attorney, Henry Wade. We've been designated as the lawyers to represent the State of Texas in this particular case.

Now, to Jim's immediate left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Fields?

[398] Q And to Mr. Cunningham's immediate left is Mr. Royce West.

MR. WEST: Mr. Fields, how are you doing, sir?

Q Both Mr. West and Mr. Cunningham, you may recall, were introduced to you yesterday—not yesterday, Monday I guess it was. I lose track of time. They're the defense attorneys who have been appointed by judge McDowell to represent the accused Defendant. His name is Thomas Joe Miller-El. Let me ask you if you can see from where you are—you may have to lean forward a little bit. He's in the powder blue suit down there. Can you see him?

A Yes.

Q Th-e reason why I've reintrc di-ced you to everyone here is to let you hear our names once again and to reacquaint you with the roles that we all play in this case and then simply to ask you if you either know or have heard of

any one of us other than from the other day when we were introduced?

A Well, since I was here Monday, I heard about the case on the radio.

Q Okay. Could you tell us a little bit about it? What did you hear?

A Well, just a spot announcement that the case was fixing to be heard and it would probably take three weeks to seat the jurors.

Q What radio station was that, if you recall?

A KRLD.

Q Did they go into anything that was purported to be the facts or did they maintain the facts of the offense?

A It was just an announcement.

Q Did they give any information at all over the radio about where it happened or allegedly happened or who was involved? Let me ask you this, sir: Was there anything that you heard on the radio or anywhere else, if you've read anything, for that matter, or talked to anybody, that you feel would influence your decision in this case or keep you from being a fair and impartial juror?

A No.

Q Okay. You could put that aside, whatever you heard?

[400] A Correct.

Q Okay. And even if you couldn't, it wouldn't affect your deliberations; is that correct?

A No.

Q Okay. Mr. Fields, as you well know at this point, you are a prospective juror in this type of case. The law allows us to talk to you individually like we're doing now instead of talking to you in front of all the other people. I believe you've been on a civil case before; haven't you?

A Yes.

Q Did the lawyers talk to you individually during that jury selection?

A No.

Q Typically they will talk to you and you have to answer questions, but you have to do it in the presence of all the other jurors. We've got a little bit of privacy here today and that's the way it is in a death penalty case because we want you to be as relaxed and feel as free to express yourself as you possibly can without having a bunch of—you know, forty or fifty other strangers [401] critiqueing everything you have to say about some personal things. Let's take advantage of that, if we can. You look like you're pretty relaxed, anyway, but if you aren't. I'd invite you to be.

A I'm relaxed.

Q Sure. Remember that there are no right or wrong answers, sir. No one is going to quiz you about this. No one is grade you on your answers. We just want to know how you feel and, in some instances, how you feel about certain things. okay?

A Yes.

Q And if you're just honest with us and tell us how you honestly feel and, if we ask the right questions, then we'll be doing our job and so will you. No one is going to talk you into anything or talk you out of it or try to. I'll guarantee you that. No one is going to argue with you, quarrel with you, pick at you, criticize you or anything like that. We want to know just honestly how you feel, seat of the pants. If you have a question at any time, whether it is while I'm talking to you or the other lawyers are talking to you, by [402] all means ask the question or make the statement if it's something you need to tell us that we haven't covered, okay?

A Yes.

Q Now, let me tell you what the State's position is in this particular case. You know that the Defendant is charged with capital murder, the most serious level of offense under the laws of this state. You know that a person who is convicted of capital murder can receive only one of two

possible penalties. one is a sentence of death and the other is a sentence of life. There is no in between. It's one or the other.

Now, let me tell you what our position is, that is the position of the lawyers for the- State of Texas in this particular case. Mr. Fields, we are actively seeking the death penalty in this particular case for Thomas Joe Miller-E1. The only reason I tell you that is, is to be fair to you and put you on notice right from the very beginning as to what our posture is and what our position is. That is, we intend to be able to provide a jury, once it's selected—and we only have [403] one juror so far—with both the type and the quality of evidence so to convince them beyond any reasonable doubt whatsoever that Mr. Miller-E1 is guilty exactly as he is charged in this indictment and nothing less.

In the second part of the trial, in the penalty phase of the trial, once again, we intend to provide a jury—that would mean you, of course, if you are on it—with the type and the quality of evidence that would convince them beyond a reasonable doubt that the questions should be answered yes in each instance which, as you know, as the Judge told you the other day, would result in the Judge sentencing the Defendant t-o be executed. Am I making myself clear?

A Yes.

Q Now, that is our position. Our position really doesn't matter because, of course, ultimately it's the position of the jury and ultimately based on the evidence. I want you to know what we're seeking and we're going about it, okay?

A Yes.

Q Now, do you have any questions to [404] this point, sir?

A No.

Q Okay. Good. With those preliminary remarks out of the way, let me just ask you, Mr. Fields, although you did indicate here on question fifty-six with regard to do you

believe in the death penalty—they don't give you a whole lot of room and you don't have a lot of time to think about it or to respond, but would you just tell us, sir, in your own words, just how you feel about the death penalty and capital punishment and your ability to actually serve on a jury of this type and actually render a decision that could result in the death of the Defendant in this particular case?

A Well, I also indicated on there that I was active in a church and, according to t-he way I personally believe, which may not necessarily be according to my denominational stance, God's word, you know, provides for the State to serve in his behalf. According to the Old Testament, people were killed if they violated His law. In its extended service, the State represents Him if the crime has been [405] committed and death is warranted.

MR. CUNNINGHAM: I'm sorry. I didn't get the last part.

A I said I feel that the State is God's extended person. In other words, the State represents God in today's time. Therefore, if the State exacts death, then that's what it should be.

Q You said there was some conflict possibly between—you said what the church believes, what your religious beliefs are—

A Well, I said me personally. There are people who are Catholic, Baptist and whatever else, that don't believe in the death penalty. They don't think it's God's will that people should be executed. They think He's a very loving God and He's not one that punishes. I don't believe that way.

Q So you have no philosophical reservations about the death penalty or any religious reservations?

A No.

Q Mr. Fields, do you feel that it serves a particular purpose?

A Does it serve a particular [406] purpose?

Q Do you think the -death penalty or the imposition of the death penalty; do you think that serves a purpose?

A ' es.

Q How do you view that?

A Well, I think that, if an individual knows that there is the possibility of death awaiting him or her, maybe they will think twice before they decide to premeditate—

Q In other words, you feel—I'm sorry. I didn't mean to cut you off.

A I just said that they would think twice about what they're going to do.

Q In other words, you feel it may well be a ieterrent to other people, to deter them possibly from committing that type of offense?

A Yes.

Q Have you ever felt differently about the death penalty?

A No.

Q You're forty-six. Are you folks alive?

[407] A Yes.

Q Do you know or could you hazard a guess what their position would have been about the death penalty?

A No, I don't know.

Q You're married to Mrs. Fields. Would you know or could you hazard a guess about—

A She feels basically the same way I do.

Q All right. Let me ask you: What sort of offenses do you feel, personally—just picking your own brain and just searching your own soul, what sort of offenses do you feel the death penalty ought to be reserved for?

A Well, the taking of a life, basically—

Q Do you feel strongly about that?

A —but then—well, yes. Now, of course, there are other crimes that fall in the same category and that would be rape and the misuse of an individual by another for his own personal gain where this individual's basic freedoms were hampered.

[408] Q You said it should be reserved, in your opinion, for murder type offenses?

A Murder, rape and slavery, I suppose you could say it that way, if a person's civil rights are being forced out of play.

Q Anything else you can think of?

A Not particularly.

Q The law largely agrees with you in that respect with the exception of the last aspect that you mentioned. The death penalty in Texas, at least, is reserved for murder-type offenses. You mentioned rape. There is one aspect of that that comes into play, a murder offense is made a capital offense. I'll talk to you about that in just a minute. Under the laws of Texas, the only offense for which you can receive the death penalty for, even potentially, is for what we call, as you know, capital murder. First you have the offense of murder. That's just called murder. That's a first degree felony under the laws of this state.

A person commits murder if he knowingly or intentionally causes the death of [409] another human being. That's basically what it is, just murder, and you can't receive the death penalty for it. Am I making myself clear?

A Yes.

Q On the other hand, if you commit murder of a certain class of individual or murder under certain circumstances, the murder itself becomes raised or elevated to a level of capital murder. You can receive the death penalty for capital murder. Do you see what I'm getting at?

A Yes.

Q An example of that is, if you commit murder during a rape or murder during a robbery, murder while you're committing a burglary or arson or kidnapping—do you see—murder plus. Or obviously, as I'm sure you well know, if you murder a police officer or a fireman or a jail guard in the lawful discharge of their duties, then you can receive the potential punishment of the death penalty. If you kill—multiple murder, you know, a string of murders in one situation, or if you hire yourself out. There are other areas,

but [410] basically, it's either class of individual or murder during a particular situation. How does that square with your way of thinking of what a death penalty case ought to be, you know, given the individual facts and circumstances?

A Okay.

Q As I mentioned earlier in my initial question, do you have any reservations at all about your ability to actually sit on this type of a jury and render a decision, actually make the decision that could result in the execution of another human being?

A No.

Q Could you do that?

A Yes.

Q All right. Now, let's talk a little bit about the way that the determination is made. In other words, the Judge talked to you on Monday and told you basically how a criminal trial is conducted here in this state. The trial itself is conducted in two parts. Let me pause a second. Have you ever been down here on jury duty, other than on the civil case?

A No.

[411] Q Well, criminal trials, all criminal trials, whether it be for the lowest misdemeanor or for a capital offense, they're all conducted in two phases or, two distinct parts. We call them two separate trials. The first part deals only with the guilty or innocence of the person who is charged. That's all. The only determination the jury makes is, the person is guilty beyond a reasonable doubt. In other words, has the State proven that he is guilty, proved all that is in this indictment beyond a reasonable doubt, or have they failed to do so. Before you could actually serve on a jury, whether it be a capital case or otherwise, you take a sworn oath to a true verdict render according to the law and according to the evidence. It boils down to this, if the State proves that the man is guilty, we've proved all the elements of the offense to you beyond a reasonable doubt, your oath requires that you find the Defendant guilty. Just the same, if we fail to prove all

the elements in the indictment, then the jury will be required to find the Defendant not guilty. Any problem with that at all?
[412] A No.

Q If we prove it to you, you could be able to find a Defendant guilty, could you not?

A Yes.

Q If we didn't, you would find him not guilty?

A Right.

Q Okay. If you find him not guilty, the trial is over. If you find him guilty, then we go on to the second part of the trial where the actual punishment is now a consideration. Do you see how they compartmentalize that?

A Yes.

Q Okay. In the second part of the trial, you can hear additional evidence to aid you in making the decision you would be called upon to make. Then again, there is no requirement on either side to offer additional testimony. You see, either side can offer testimony, but neither side has to. Am I making myself clear?

A Right.

Q If you didn't hear any more [413] testimony in the second part of the trial, then you would be called upon to make a decision as to the punishment on the basis of all you learned in the first part of the trial. While the trial is in two parts, you see, in the second part of the trial, you can consider all the evidence you heard up to that point, even in the first part. Do you see what I'm getting at?

A Yes.

Q In other words, you're not limited to what you hear in each section. How, whether you hear additional testimony or not, at the end of the second phase of the trial, it used to be that juries made a decision direct in a capital case whether a person should live or die or receive a number of years. In other words, if you had a particular feeling about it and after you heard the evidence, you thought the person ought to die and the other eleven people agreed, that's how you voted and

that's what it was. If you thought it should have been life and everyone agreed with you, everyone on the jury unanimously agreed, then it's life or some number of years, but you made [414] the decision on a personal basis. You decided personally how the evidence affected you and what you wanted to vote for.

That changed about thirteen years ago and that particular prerogative has been taken away from the jury. Instead of holding the life or death or a number of years on the basis of your personal feelings, instead you're called upon to answer these three questions. It's on the basis of the answers to the three questions that the law requires the Judge automatically to assess a penalty of death or a sentence of life. Am I making myself clear?

A Yes.

Q Now, you know as well as I do at this point that all the answers that are submitted, you -can receive no more than three—and I'm going to let you look at them in just a second. If all the questions are answered yes, then the law requires and would require—and there's no doubt in mind that Judge McDowell would follow his oath, as a Judge of the courts—the Judge to sentence the Defendant to be executed. He can't override your verdict. He may not necessarily [415] agree with your verdict, but you wouldn't know that. He cannot say, "Well, you answered these questions yes, but I think he should get a life sentence." or "I'm going to give him a life sentence instead of the death sentence." He can't do that. If you answer all three questions yes, the Judge will sentence the Defendant to be executed. It's just the same, if you answer on or more of the questions no, you see, whether he agrees with you or disagrees with you, it doesn't matter. He will assess a sentence of life. Am I making myself clear?

A Yes.

Q All right. Now, you know that the State has the burden of proof in both parts of the trial. We brought the indictment.

We've done the accusing and we must also do the proving. The same thing holds true for the second part of the trial. We're seeking the death penalty. We must provide you and the other jurors with the type and quality of evidence that convinces you that the questions should be answered yes. If we do, then you answer the questions yes. If we don't, you [416] answer the questions no. Any problem with that at all?

A No, sir.

Q Okay. Let's take a look over here on the left. There's a number one, a number two and a number three. Take your time and read those, sir, if you would, please, and we'll talk about them in just a second.

A (Juror complies.)

Q Have you had a chance to look at those?

A Yes.

Q Did they cause you any problem right off the bat, any confusion?

A No.

Q All right. You understand that you would only be called upon to answer these questions, Mr. Fields, assuming—let's just set a hypothetical example here. Let's say you're on a capital murder case and you've heard all of the evidence in the first part of the trial and you and the other jurors agree that the Defendant is guilty. Let's lust assume that imaginary case, okay? You've heard all the evidence in the second part of the [417] trial or you've concluded the second part of the trial, whether there was any additional evidence or not. You're back in the jury room and you're called upon to answer these questions. Now, the first question asks, was the conduct of the Defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result. What do you think you're being asked there, Mr. Fields?

A Oh,-it's asking—wanting to know if the person who committed the crime did it deliberately, with the premeditated intent to kill.

Q Okay. In other words, you look to the conduct of the individual. I think you can see that probably—you're seeing the information that you need to answer this question probably when you're learning about the offense itself, how it all happened, what role the Defendant played, and so forth and so on. You decide whether he acted deliberately, was whatever he did, whatever role he played, did he act deliberately. Some people say [418] intentional, but was it deliberate conduct. Did he intend to do it and did he act deliberately. Furthermore, was the act or whatever he did, shooting somebody, whatever it may not talking about this case, I'm just talking about hypothetical example—was reasonable expectation that someone was to die. Can you see how you can answer question yes or no depending on the facts of the case?

A Yes.

Q Let's go on to number two. What do you think is being asked there, is there a probability that the Defendant will commit criminal acts of violence that. would constitute a continuing threat to society?

A Well, this is asking, I think, would the person be classified as a professional criminal or was this just an isolated incident that resulted in the death.

Q What do you think would be the most valuable evidence that you could receive? In other words, if you could say to us, "Mr [419] Macaluso, this is what I consider the most important. I would like to know this about the individual or know that about the individual.", if you wanted to answer that question yes? What can you tell us in that regard? What do you think would be the most valuable thing for you, Mr. Fields, to know about somebody that would enable you to answer that question yes?

A Well, if the individual at the time the crime was committed—if there were individuals who saw what took place or whatever, some type of, you know—an individual or a film or whatever that indicated the person did the crime.

Q Let's just assume that you—understand that you've already found the individual guilty of the offense. Now, you're deciding whether or not there's a probability he would commit future acts of criminal violence. What sort of evidence do you think would aid you, what sort of testimony, what sort of facts, what sort of background, in deciding whether or not this is the type of individual that would probably do something of a criminal nature again?

[420] A Well, typically you would say a history of the person's past actions, but I would think also possibly hearing that individual himself talk to me.

Q Well, you understand—let me just back up a second. You understand that in a criminal trial, no matter what kind of criminal trial, be it capital murder or shoplifting, any person charged with a crime has a right not to testify?

A Yes.

Q Although I have no way of knowing, in any case, whether a Defendant will testify or not, let's assume that the Defendant does not for these purposes. Do you understand that, if the Defendant wants to testify, he can and, if he doesn't want to, no one can make him? Do you understand that, also?

A Yes.

Q If he chooses not to testify, that's fine. That's a right that we all have. You cannot consider that as any evidence of his guilty whatsoever. Do you understand that?

A Right.

Q You can't hold that against him in [421] either part of the trial?

A Right.

Q So it may well be, during the trial, that you may not hear from the Defendant, do you understand that, so wouldn't

have that information to assist you. Let me ask you this, Mr. Fields: Do you think you could learn enough about an individual when you learn about the crime itself for which he's on trial, when you learn the dynamics of the crime, the very spastics of the crime? In other words, what lead up to the crime, what planning was involved, what role did a Defendant had in that planning, if any, what alternatives he could have taken, did he have to commit this crime. I mean, was it necessary or, you know, any stretch of the imagination, doing the commission of the offense itself? Did he have to do this? Did he have to do that? How violent and vicious was it? What role did he play in it? was he subservient or was he active in calling the shots, so to speak? Do you see what I'm getting at?

A Yes.

[422] Q What alternatives did he have? What about afterwards, how did he react? Did he show remorse and contrition or was he nonchalant, was he blase, did he care, you know, was it another day at the office, was he the type of person that it was just like swatting a fly? Do you see what I'm getting at?

A Yes.

Q Do you think you could learn enough about an individual when you learn all of those facets of his involvement in a very serious capital murder to tell you to answer that question, yes, there's a probability he would commit some criminal acts of violence in the future? Do you think you could do that?

A Right.

Q I'm not trying to—I just want to know how you feel about it. Don't go along with me. If you don't think so, fine. Do you think you could?

A Yes.

Q You said, also, that you would like to know about his background?

A Right.

[423] Q All right. Other criminal acts and so forth?

A Yes.

Q Let me just ask you briefly: What does that word probability mean to you in that connotation?

A Well, it means is there a possibility that he will continue to lead this type of life, will he be rehabilitated or does he intend to make this a life-long ambition.

Q Let me ask you, Mr. Fields, do you feel as though some people simply cannot be rehabilitated?

A No.

Q You think everyone can be rehabilitated?

A Yes.

Q I'm just curious. How would you ever know that there is somebody that—well, you said something earlier, but I can't remember exactly what it was, about whether or not somebody could be rehabilitated in conjunction with one of my questions earlier. You said that would tell you whether or not somebody could possibly be rehabilitated?

[424] A Well, I think you're talking about the fact of whether or not it was premeditated. It may be far-fetched, but I feel like, if a person has the opportunity to really be talked about God and he commits himself, whereas he has committed this offense, then if he turns his life around, that is rehabilitation. I know the State has a program that is supposed to work, but also it has a relatively bad record. I feel like when an individual has really been truly reached by someone reading the word of God to him and they are repentant and they do have a real act of contrition, they can be rehabilitated and that's been demonstrated.

Q Let me ask you this, sir—and I don't mean to quarrel with you. I want you to understand that. These questions are very important to all of us and your impressions of these questions. As I said earlier, you're not saying anything right and you're not saying anything wrong. You're just being honest with us. You notice that there is nothing in these questions that directly verbatim addresses rehabilitation. The

word is not used there. [425] Of course, I can't tell you what these questions mean. Do you understand that? That's for you to decide. Let me ask you this hypothetically: Do you feel that if somebody, as you just said earlier, if the Defendant—and we're not talking about Mr. Miller-E1. We're just talking about an imaginary Defendant—were to get on the witness stand and indicate to you that he is repentant and has had this religious experience or conversion or exposure, at least, if you were to believe him, do you feel that you could ever answer these questions yes regardless of the evidence at that point? Could you ever allow this person to ever be executed?

A Yes.

Q I'm just curious. How would that square with your feelings about rehabilitation?

A Well, now based on what you said as far as the crime goes, there are only two things that could be rendered, death or life in prison. If for some reason the testimony didn't warrant death, then life imprisonment would give an individual an opportunity to rehabilitate. But, you know, you said that the [426] jurors didn't have the opportunity to make a personal decision in the matter with reference to what I thought or felt, but it was just based on the questions according to the way the law has been handed down.

Q Let's shift gears away from capital murder and let's talk about a situation that I'm not suggesting occurred in this particular case, but it something I have to approach with you at this point because we have the opportunity. Let's imagine again that you're on a jury, a capital murder case. Let's say it's a murder alleged to have been committed during a rape. That's a type of capital murder. Let's say you were convinced, along with the other jurors and you don't have any doubt whatsoever that the Defendant committed the murder, but let's say you don't hear any testimony about any rape or you have a reasonable doubt that it occurred during the commission of a rape, you understand that if we expect you to

convict somebody of capital murder, we have to prove both the murder and the rape. Am I making myself clear?

A Yes.

[427] Q We haven't done that, have we?

A No.

Q Not in that example. What you do in a situation like that, you have to, under your oath, find that Defendant not guilty of capital murder simply because we didn't prove capital murder. Do you see? What did we prove?

A You proved rape.

Q No, we didn't prove rape at all. We proved murder.

A Well, one or the other.

Q Right. There's no testimony on rape, but there is testimony on murder and you're convinced it was a murder, so you find him guilty of murder. It wouldn't be capital murder and if it's not capital murder, it's not mandatory life or death. Do you see what I'm getting at?

A Yes.

Q In that situation, you would be called upon to assess a penalty for the offense of murder, not capital murder, but just regular murder and you can't receive the death penalty for regular murder. Now, so we're clear on [428] this and I want to be brief about this, but I need to cover this with you. When we talk about murder, we're talking about a situation where one person knowingly or intentionally or both, knowingly and intentionally, causes the death of another individual without any legal excuse and without any legal justification at all. So when you talk about murder, I want to divorce from your mind, if we can, a homicide, you see, where you have somebody who was acting in self-defense. In other words, when you talk about the range of punishment for murder, we're not talking about a range of penalty for a situation where you believe someone killed somebody else, but they did it in self-defense because, if you believe that someone acted in self-defense—for example, if I felt that Mr. Nelson was going to kill me or you felt that way about me, you have

the right to protect yourself all the way to the point of using deadly force to kill me. See, you could be charged with murder or I could be charged with murder, but if the jury believed that I acted in self-defense, they would have to find me not guilty. Do you see what I'm getting at?

[429] A Yes.

Q It's not like you're giving a lower penalty. Huh-uh. You have to find the Defendant not guilty. Do you see what I'm getting at?

A Yes.

Q So when we're talking about murder, forget about someone that kills in self-defense. All right? The same thing holds true if you believe it was an accident. It may look like murder and somebody could be charged with murder, but if you believed honestly or had a reasonable doubt that it was an accident, the gun went off accidentally or something like that, you don't give them a low punishment. You find them not guilty. So don't be thinking about accidents, either, all right, or insanity. A lot of people are skeptical about insanity defenses these days for whatever reasons, but if you believed someone was insane at the time he killed somebody, you would have to find them not guilty, so don't be thinking about that. The same thing holds true if you believe it was a crime of passion. That's a situation—as an example, if someone comes [430] home and finds out that their child has been sexually molested by a neighbor and the neighbor is up the street laughing about it and you go into a rage basically, adequate cause, you take a gun and you kill the neighbor. The law doesn't excuse that, but it doesn't make it murder, either. If you were on a jury and you believed that the person killed with that kind of sudden passion, that sort of influence, you would not convict him of murder. You would convict him of voluntary manslaughter, so that's not murder. Do you see what I'm getting at?

A Yes.

Q The reason I'm making that point is, I want to make sure you understand as clear as I can present it what murder is. Now, the penalty range for murder is as broad as it is for any offense under the laws of this state. Okay. Let me ask you—I know you said earlier that you felt obviously strong about murder being, obviously, a very serious offense.

THE COURT: One moment, please. Is this a juror?

[431] MR. MACALUSO: Thank you, sir.

Q Mr. Fields, if you had the power, what do you think the minimum penalty ought to be for a murder as I've described it? In other words, I can't give you facts and situations like this type of murder or that type of murder, but excluding those things that we did discuss, excluding self-defense, excluding insanity, excluding accident, excluding any crime of passion or an emotional type thing.

A Are you saying that all of those you just named and described earlier—say types of violence that have a premeditated reason; is that what you're saying—

Q No.

A —and murder without a premeditated reason—

Q No. What I'm saying is, if one person knowingly or intentionally kills another and there is no legal excuse or justification. Those four things I gave you are legal excuses or justification. You see?

A Okay.

Q In other words, a person knowingly [432] or intentionally kills another person and it wasn't in self-defense because- that's not murder and it wasn't insanity and it wasn't an accident and it wasn't a crime of passion.

A Well, based on what I told you earlier, death would be the result.

Q All right. Now, that's your personal feeling; is that correct?

A Yes.

Q Now, let me explain, but it's not my position to argue with you or quarrel with you and I'm not going to do that. The range of penalty under the laws of Texas for the offense of murder is not less than five years nor more than ninety-nine years or life, depending upon the facts of a murder case, but still bear in mind excluding those four things that I described to you. I'm not talking about any of those. I gather from what you're saying—or just tell me in your own words, could you ever, would you ever, think, sir, that a five year sentence would ever be proper under any facts and circumstances for the offense of murder where one person knowingly or intentionally causes the death of another person, no self-[433] defense, no accident, no insanity, no crime of passion?

A Now, you asked me could I—you want to know what do I think the minimum penalty would be in a case of murder?

Q Right. What I actually want to know is, would you ever, knowing yourself, feel that five years would be enough, that the minimum punishment, five years—could you ever assess a penalty for five years in a murder case regardless of the facts or circumstances? As long as there is a murder, could you ever give as low as five years?

MR. CUNNINGHAM: And he felt that was the proper punishment based upon the law and the evidence that he had heard, Your Honor.

A Are you meaning personally or based on how the law sets this out?

Q Well, I guess a combination of both.

A Well, I was asking him, was he meaning how did I feel about it personally or how did I feel about it in regards to how the [434] law says it is.

Q Well, the law sets out—you see, we want to know how you feel.

A Well, it would be fine.

Q You say you could give five years?

A I'm saying I could give five years.

Q And if you felt it was proper, if the facts and circumstances called for ninety-nine years or life?

A I could give that.

Q Let me ask you this, sir: Do you know of any reason why you couldn't sit in judgment of another human being in a case of this type?

A No, sir.

Q The law says that a conviction can be had—that is, the jury can base a conviction on the testimony of one eyewitness to a crime. That's what the law says. You can understand how frequently there may be only one eyewitness to a crime, a lady is raped or someone has had their purse taken from them, whatever the case may be. There may be one survivor to whatever offense it is. The law [435] says that, whether it be capital murder or shoplifting or rape or purse snatching, if the jury believes that one eyewitness beyond a reasonable doubt—in other words, they believe that person can recognize the individual and testify to all the elements of the indictment, the jury can base a conviction on that and nothing else. How do you personally feel about it? Could you base a conviction in a capital murder where the death penalty is a potential on the testimony of one eyewitness if you believed the eyewitness beyond a reasonable doubt?

A Yes.

Q I'm just going through the questionnaire here. You said your brother—it says, "Have you, your spouse, or close friend or relative, ever been charged, arrested, indicted, or convicted of any criminal offense?" and you said something about your brother?

A Right.

Q Could you tell me a little bit about that?

A He was arrested and convicted on a [436] number of occasions for possession of a controlled substance.

Q Was that here in Dallas?

A Yes.

Q Was he involved in any trials or anything like that?

A I suppose of sorts. I don't really know too much about it.

Q Was he ever convicted?

A Yeah, he served time.

Q Do you feel that that would in any way interfere with your service on this jury at all?

A No.

Q Mr. Fields, you've been very polite and very kind and very open with us and I appreciate that. Let me just ask you, sir, whether I touched on it or not, is there any reason that you know of why you could not be fair and impartial to both sides?

A No.

Q Do you have any questions of me at all?

A No.

MR. MACALUSO: Thank you [437] very much. Your Honor, I'll pass the juror. Mr. Fields, Mr. Cunningham and Mr. West will have some questions for you.

THE COURT: Go ahead, Mr. Cunningham.

[438] EXAMINATION

BY MR. CUNNINGHAM:

Q Mr. Fields, as you have been advised, Mr. West and myself represent Thomas Joe Miller-El in this case where he is charged with the offense of capital murder. Very briefly I'd like to ask you some questions with reference to the questionnaire and possibly concerning some of the law.

First of all, what age man are you, sir?

A As of yesterday, I'm forty-seven.

Q Happy belated birthday. How long have you lived in Dallas County?

A About twenty-five years, twentyfour years. I came here in '62.

Q What is your race?

A I'm really colored.

Q Okay. Are you married, single or what is your marital status?

A I'm married and I have four children.

Q Does your wife work?

A No, she doesn't.

Q Where do you work?

[439] A I work for the U.S. Postal Service.

Q That's here in Dallas?

A Yes.

Q How long have you worked for the postal service?

A Eighteen years.

Q Do you have any children?

A Yes, four.

Q What do they do?

A They're all students from a senior in high school down to the third grade.

Q You attend St. Monica Catholic Church?

A Yes.

Q Is that an integrated church?

A Yes.

Q What racial mixture would you say it was? You know, how many—

A Oh, I would say the majority there are white or caucasian and then the next majority would be Latin American or Mexican American and then your people from the far east or middle east Indian, Vietnamese.

Q In other words—your church is [440] located where, in North Dallas?

A It's at the corner of Walnut Hill Lane and Midway Road.

Q How long have you been a member of St. Monica Catholic Church.

A For ten years.

Q Do you teach Sunday school or hold an office or anything?

A Well, in the Catholic church you don't have Sunday school as it's set up in the protestant church. I'm a member of the Holy Name Society and that's a men's organization and it's basically devised or set up to assist the pastor as he needs and to promote the belief of Christ.

Q How long have you been a member of the Holy Name Society.

A. For the last seven years. Now, in conjunction with that, as far as teaching goes, not within that parish, but at large within the Catholic church, there is what we call the charismatic renewal and I have taught there.

Q How long have you taught in the charismatic movement within the Catholic church?

[441] A Eleven years.

Q I notice that you attend this church more than once a week?

A Well, between the movement and the church, yes, and meetings, and we have only days of obligation which requires you to attend more than once a week.

Q You've indicated that you are a member or a financial supporter of a media church. What church is that, sir?

A St. Monica.

Q St. Monica?

A Oh, I'm sorry, the media church. Yes sir. The 700 Club on—which is—

Q How long have you been a contributor to the 700 Club?

A About five years.

Q You indicated that you have heard something on the radio, I believe—was it the radio?

A Yes.

Q You understand that that is not evidence in this case?

A Right.

Q And you could not consider that as [442] evidence?

A Right.

Q Would you do that, sir?

A Well, like I said, yes, I can do it, but it didn't go into any detail. It just said that this was coming up and it would probably take three weeks to seat jurors and that's where the thing ended.

Q You also understand that, if you heard something—if you were chosen as a member of this jury and you heard something on the radio or saw something on TV or read it in the papers, you could not consider that as any evidence whatsoever?

A Right.

Q How long have you had the bumper sticker on the back of your car?

A Eleven years.

Q And that bumper sticker says what?

A It says, "Jesus Renews the Hearts of Men"—or "Jesus Renews Hearts" in big letters and then "(the Hearts of Men)" in parentheses.

Q You indicated that you had received a ticket once and you felt that it [443] wasn't deserved?

A Right.

Q The fact that you received this ticket would not affect your decision if chosen as a juror in this case, sir?

A No.

Q You indicated that either a friend or—a member of your immediate family or a closer friend was a victim of a crime. Is that "mugging"?

A Yes.

Q Was it someone in your family?

A No, a friend.

Q Was anyone ever caught or anything?

A It just recently happened, so no one has been caught.

Q The fact that you have a friend that was mugged would not affect your decision, if you're chosen as a juror, in this case?

A No.

Q You would be fair to both sides?

A Yes.

Q Mr. Macaluso asked you about your brother. Whatever happened to your brother, [444] that would not affect your decision, if chosen as a juror, in this case, sir?

A No.

Q If you were chosen as a juror in this case, would you base your decisions only upon the evidence that you heard and the facts of that case, sir?

A Yes.

Q Let the chips fall where they may?

A Yes.

Q Do you know of any other reason why you could not be a fair and impartial juror, sir?

A No.

Q I'm going to add one word onto that. Do you know of any other reason why you could not be a -fair and impartial juror other .than your race, negro or color black?

A No.

MR. CUNNINGHAM: Pass the juror, Your Honor.

MR. NELSON: Judge, may we approach the bench?

THE COURT: Surely. Mr. Fields, let me ask you to go out [445] in the hallway while we have a law matter to take up here and, in that way, we can just do it without the lawyers having to come around.

(Whereupon, Mr. Fields left the courtroom, after which the following proceedings were held.)

MR. NELSON: We have an indication, Judge, that this juror has what they denominate as an annual leave coming up in the next couple of weeks and we thought that was a

situation that the Court ought to check into before a decision is made as to the qualification of this juror.

THE COURT: Well, I ca.n go into—go ahead, Mr. Cunningham.

MR. CUNNINGHAM: Your Honor, we would object. Mr. Macaluso talked with this prospective juror thirty minutes or more. I think one of his questions was whether [446] or not there was any reason why he' could not be a fair and impartial juror. I asked him the same thing. If he thought that his coming vacation would affect his sitting as a juror, the State could have inquired. If he had thought—and I would suggest from the answers we have received from Mr. Fields—it would affect his decision as a juror, he would have told us.

THE COURT: The only concern the Court has is, if he is accepted—I don't know what is going to happen, obviously. would need to ask him, frankly, before I swore him, if there was any reason why he couldn't come back and serve in a month, say. I have had that happen.

MR. MACALUSO: I might add, Your Honor, that I have had this occur a number of times and I think we all have. I'm not trying [447] to play word games here, but I did overlook asking that question and I. think the question, as Mr. Cunningham mentioned a moment ago, did address it, was there any reason why you couldn't be fair and impartial and not whether there is anything that would impede your service on this jury. I have had in the past and I know the Court is aware of situations that have occurred where we neglected to ask that question only to have it come up later on.

THE COURT: Well, Mr. Cunningham and Mr. West, how about the Court inquiring of him just in that area? I don't know where this information comes from.

MR. CUNNINGHAM: Your Honor, on behalf of the accused, Thomas Joe Miller-E1, Jr., I would object to even the State, the defense, or the Court inquiring of the juror whether or not the fact that he [448] has a vacation coming up in one week, two weeks—and it looks like it's getting even longer in this case—and would suggest that under Article 35.11 that all the State can do now is decide whether or not it wants to accept or reject this juror.

THE COURT: Mr. Nelson, Mr. Macaluso, I agree with the defense on that. I probably would still like to inquire if he is accepted.

MR. CUNNINGHAM: And then he would have to make other arrangements. It's just that simple.

THE COURT: That would be my position, unfortunately. I'm going to hold the juror qualified at this point, Mr. Macaluso and Mr. Nelson, and ask you-all to tell me whether you wish to accept or swear the juror?

MR. MACALUSO: We'll exercise—reluctantly exercise a [449] preemptory challenge, Your Honor. I want to ask the-Court, does the Court intend to make an inquiry?

THE COURT: Of him, or just in the future of all jurors?

MR. MACALUSO: Of him.

THE COURT: If you wish, I will, yes, just for information purposes.

MR. MACALUSO: I understand. I can envision a situation, because I've seen it before, where it comes back to haunt us somewhere down the line.

THE COURT: I had that happen in the last case you and I did and we spent about three hours on the juror and found out in the last five minutes that he had some—I think in the future what I will do, when I'm doing my little preamble there, is just tell the person—remind them again what the potential

schedule of this case is and ask them if [450] there is any reason they would be unable to do that. If they indicate there would be, I'll let the lawyers start pursuing it.

MR. WEST: Before we bring the juror back in, may the record reflect that is the second black that's been called by the Court for voir dire purposed.

THE COURT: The record may so reflect. I might add—go ahead, Mr. Nelson.

MR. NELSON: Your Honor, with reference to that, the State would like to offer into the record the fact that we're certainly not exercising a preemptory strike on Mr. Fields because of his race in this case, but we do have concern with reference to some of his statements as to the death penalty in that he said that he could only give death if he thought a person could not be rehabilitated and he

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[478] MARGARET M. GIBSON, called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Ms. Gibson. Let me begin by reintroducing everyone here. My name is Paul Macaluso and-to my immediate left is Mr. Jim Nelson.

MR. NELSON: Good afternoon.

Q You may recall being introduced as well to Norman Kinne. He was seated over here. We are all assistant criminal district attorneys in Dallas and we're assistants to Henry Wade who,. I'm sure you know, is the district attorney for the next ten months or so. We've been designated to

represent the State of Texas in this particular case. To Jim's immediate left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you doing, Ms. Gibson?

MR. GIBSON: Very well,

* * * *

[482] punishment. Do you see what I'm getting at?

A Uh-huh.

Q As I said earlier, all we want to know is exactly you feel or any juror feels with respect to the potential service on a case of this magnitude.

Now, let me tell you right off what our position is and that is the position of the State of Texas with regard to this particular case. Ma'am, we are actively seeking the death penalty in this case. The State of Texas here in Dallas County is actively seeking the death penalty for Thomas Joe Miller-E1. That is, we intend to be able to provide the jury, once it is selected, with the type and the quality of evidence that will convince them beyond any reasonable doubt, in the first phase of the trial, that the Defendant in this case is guilty exactly as he has been charged with capital murder.

Then in the second part of the trial, we intend to be able to provide a jury with both the type and the quality of evidence that would convince the jury beyond any reasonable doubt that those questions that will [483] be submitted to the jury in that phase of the trial should be answered yes. I'm sure you may recall from the remarks of the Judge, all yes answers, two or three, whatever the number of questions you get, all yes answers will require Judge McDowell by law mandatorially to sentence the Defendant in this case to be executed by lethal injection down in Huntsville, Texas. The reason I'm telling you that is not to—well, just to be fair with you basically, to tell you what our position is.

Ultimately, of course, our position really isn't what controls, you understand that, it's the findings of the jurors who ultimately will comprise this jury. I think it is only fair to let you know what our position is up front, that we are actively seeking, at the end of this trial basically, that this man be taken down to Huntsville, Texas and put to death. Like I said, it would be unfair of us not to let you know that, what our position is.

Now, you have been asked here about your position and your feelings about the death penalty. As I said, no one will quarrel [484] with you. No one is going to make anybody serve on a jury, for example, if they have a strong type of either religious, moral or personal convictions that would prevent them fro: participating in this type of a case. Let rye just tell you that right off. That's why we get to ask you these questions now, to clarify certain things, so that you ultimately can tell us—I'm saying tell us, you're really telling all of us. Even though you're looking at me now and I'm asking the questions, they're listening to everything you have to say as is Judge McDowell, as is the court reporter who is taking down everything for appeal purposes.

No one is going to try and put you in a position that is untenable, be it strong, religious or whatever feelings there may be that could prevent you from actually serving on this type of a jury. Now, let rye just ask you before we go any further. I know you've been asked this question on three lines here. Fifty-six was, do you believe in the death penalty. Let mE: just ask you, if you could in your own words, to share with us your personal feelings about the death penalty and capital [485] punishment and then, secondly, probably just as important, your ability or inability to actually on a jury of this type and render a decision or actually participate potentially in the execution of the Defendant?

A I don't believe in the death penalty. I don't know why it was started. I don't think it solves anything. It's the

ultimate punishment and it's part of the law and, if the law so renders the death penalty, I can't stop it, but I personally do not believe in it.

Q Is this for any particular reason? Is this a personal feeling that you have about it or—

A It's a personal belief.

Q All right, Have you felt this way for some number of years or just—is it something you've thought about, you know, more seriously, of course, when you were asked or informed that you were going to be a prospective juror on this type of case?

A Oh, I think I answered that ray gut reaction was that I don't believe in it and I never really thought much further than that. I

* * * *

[506] put aside your personal feelings?

A Yes, I do.

Q I think you've already said you could do that. Do you understand that the convex of that is just as true? Let's say you heard a case where you said, if I could vote, as you've said, I would never, ever vote for a sentence of death. It's a capital murder, but it's not the type of capital murder that anyone should be executed for, but in all intellectual honesty, number one, they proved that to me. I'm being honest about it. It should be answered yes and number two yes and number three yes. Would you go ahead and do that and put aside your personal feelings?

A Yes, I could.

Q Now, let's shift gears here for just a second in the time that I have remaining and let's talk about a situation that I'm not suggesting would occur in any case, much less this one. It's a situation where, again, b1pothetically Ms. Gibson is on a jury and it's a capital murder case. Let's say it's a capital murder and it's murder during a burglary, as an example of another type of a [507] capital murder. How, let's say that

you have heard all the evidence in the first part of the trial, the first phase of the trial, the guilt or innocence phase, and you and the other jurors have no doubt whatsoever that the Defendant in that case committed murder, but you didn't hear any testimony about a any burglary or you have a reasonable doubt about it. Do you understand that for us to expect you to convict someone of capital murder, we have to prove both components of the offense, a i murder and a burglary? Am I making myself clear?

A Yes, sir.

Q We didn't do that though, did we?

A No.

Q So you can't convict him of capital murder. You car. only convict him of what we proved to you and that's the offense of murder. Were that to happen, were you to convict someone of murder and not capital murder, but just murder under the laws of Texas, then you forget all about death, mandatory death and mandatory life. The range of penalty for murder is very broad. In fact, [508] it is as broad as any range for any offense under the laws of the State of-Texas.

Now, let me talk to you a little bit about what murder is and what murder is not. Murder basically is a situation where one person knowingly or intentionally causes the death of another individual without any legal excuse or legal justification. You see, you can kill somebody under certain circumstances and it's not murder. In fact, I'm going to cite four examples for you right now. For example, you can kill someone in self-defense. You could be charged with murder, but you—let's say, if I was charged with murder and you were on my jury and you believed that I acted in self-defense, reasonable self-defense, you would have to find me not guilty. Do you understand that?

A Yes.

Q Because I would have to find you not guilty if it was I on your jury. You can kill somebody—you have a right to

self-defense and so do I. We're not thinking about murder when we talk about the range of penalty. We're not talking about self-defense when we [509] talk about that sort of thing. That's not guilty. It's no offense.

The same thing would hold true if you believed that someone charged with murder acted accidentally. It was an accident. The gun fell or the gun went off accidentally or however it was. That's not murder, either. That's not guilty if you believe that—or if you felt someone was insane. As much as people get up in arms about the insanity plea these days, if you honestly believe or have a reasonable doubt that the person charged with murder acted because he was insane, you have to find him not guilty. It's not murder. if it's a situation where someone killed somebody in the act of sudden passion, in other words, the heat of sudden passion, that's not murder, either. In other words, if a father were to come home, God forbid, and find out that his little daughter had been sexually abused by a neighbor and the neighbor was up the street laughing about it and he goes into a rage. He flies off the handle, picks up a gun, runs down the street and kills the neighbor. The law doesn't excuse that. Some people think it is [510] temporary insanity. The law doesn't excuse that behavior, but it doesn't call it murder. If you believe those facts and you're on a jury, you wouldn't convict that individual of murder because it is not murder. It's voluntary manslaughter basically. Do you see what I'm getting at?

A Yes.

Q What I'm saying is, I want to draw a clear distinction between what murder is and what murder is not when we talk about the range of penalty, that broad range of penalty. Again, I don't want to dip back into the cliche bag, but the law expects a juror to be able to tailor the penalty in a murder to fit the facts as they decide them to be.

Let me ask you: Erasing the self-defense, erasing the accident, erasing insanity and erasing the crime of passion,

let me ask you, what do you personally feel the minimum penalty ought to be for someone who knowingly and/or intentionally causes the death of another individual, commits murder? What do you feel the minimum penalty ought to be under any facts and circumstances?

[511] A I don't know. I've never thought about it before.

Q All right. Let me ask you this: The range of penalty under the laws of the State of Texas is as low as five years, as high as ninety-nine years or life and an optional $10,000.00 fine and the law expects a juror, if they can in all honesty, to be able to set the penalty to fit the facts after they've heard all the evidence, if they can. Erasing those other qualifications, they don't mitigate a murder by saying, "I think he might have been insane and I'll give him five years." If you think someone, is insane, you forget about it and you find him not guilty. Am I making myself clear?

A Yes, sir.

Q I just want to make sure you're not considering those things. Let me ask you: Do you believe you could ever set a penalty as low as five years if you felt the facts and circumstances warranted it? In other words, do you feel, whatever the set of facts and circumstances to your way of thinking would ever justify a sentence as low as five years in [512] the Texas Department of Corrections for a knowing and intentional murder?

A Yes.

Q Okay. I gather, if you heard facts and circumstances that called for a sentence as high as ninety-nine years or life, could you do that?

A Yes, I could.

Q And even an option of a $10,000.00 fine?

A Uh-huh.

Q One other matter. Let me ask you this: Could you—the law allows the State to prove either a capital murder or a shoplifting case or a rape case or whatever the case may be using the testimony of one eyewitness to the case. If you

believed the eyewitness and you believed the eyewitness is capable of testifying as to all the allegations contained in the indictment—okay?

A Uh-huh.

Q Like I say, whether it be a capital murder or whether it be shoplifting a package of chewing gun, how do you feel about that? Do you believe that in a case of this

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[523] please.

(Whereupon, Ms. Gibson left the courtroom, after which the following proceedings were held.)

THE COURT: Mr. Macaluso, I hold the juror is qualified. You-all may want to discuss what you want to do.

MR. MACALUSO: Judge, we would be pleased to exercise a preemptory challenge.

THE COURT: Bring her back in, Ted.

(Whereupon, Ms. Gibson returned to the courtroom and the following proceedings were held.)

THE COURT: Ms. Gibson, you've been excused from service in this case, which means you can leave here and go back to your job, your home or whatever. I'm not going to let that happen though without thanking you for

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[527] CAROL A. TAYLOR, called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Ms. Taylor. As I was introduced to you on Monday, my name is Jim Nelson and sitting next to me is Paul Placaluso. I think you'll remember that on Monday there was a gentleman sitting right at the corner of that table. His name is Norman Kinne. The three of us are assistant criminal district attorneys here in Dallas. We've been assigned to present the evidence for the State of Texas in this case. Seated to my left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are you, Ms. Taylor?

MS. TAYLOR: Fine.

Q To his left is Royce West.

MR. WEST: Good afternoon, Ms. Taylor.

Q These two gentlemen have been

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[529] myself clear on anything.

You're a prospective juror in this case. We have one juror at this time. We need eleven more. What we're going to try to do in the next few minutes is get to know as much about you as we can in a little bit of time. In order to do that, we're going to as some questions that—I'm going to ask you for some personal feelings about things and that's part of the reason, I think, you're in here by yourself rather than with the entire group as you were on Monday. I didn't notice, but have you been on jury service before, ma'am?

A No.

Q If you have been, you would have probably spent most of your time in a group out here with forty or fifty other people aid we would have talked to you in that situation rather than individually. Since this kind of case has so many

weighty issues in it and it calls for some very strong personal opinions, we feel like maybe you could be a little bit more open this way and we hope that you will be.

I want you to know right up front [530] what the position of the State of Texas is in this case. We are now and are _going to continue to actively seek the death penalty for the man at the far end of the counsel table, Thomas Joe Miller-E1. We feel like you have a right to know that so you'll know what you're dealing with going in. We plan t,o present to you sufficient evidence for you to find beyond a reasonable doubt that he's guilty of the offense of capital murder and we plan to give you the type and qualify of evidence to convince you that you can answer each of those three questions yes, along with the other eleven jurors that serve on this case. The result, if you and your fellow jurors answer each of those questions yes, is going to be an automatic death penalty for this Defendant. So that's where we are.

Now, I notice in looking at your questionnaire—I know you did this in the hallway or at lunch or something and didn't have a whole lot of time to look at it or think about it, but there was a question on there about the death penalty. I'm going to ask you again, if you would, to just tell us how you [531] feel about the death penalty.

A. Well, let's see. I've never, you know, had to make a stand on this before, so when I was asked, I thought, yeah, I think I do believe that, if someone has committed a crime that's bad enough that the Court's think that he should be put to death, well, yes, I think that he should be because he doesn't need to be out in society any longer. I think the Bible says an eye for an eye.

Q You feel like it serves a purpose then; is that right?

A Yes, I do.

Q Okay. Would that purpose be -you've mentioned taking him out of society. Is there also a deterrent effect?

A You mean like life in prison or something like that?

Q Well, no. What I'm asking is, do you feel the possibility of the death penalty or the fact that it is there might be a deterrent to persons who are considering committing certain types of crimes?-

A They should think about it, but I don't think it's used quite enough that it

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[548] Now, something we don't expect to happen, but that might happen is, a person-would just be ' proved guilty of murder. Do you remember that I told you that we had to prove both the murder and it was in the course of committing robbery?

A Right.

Q Well, let me use a hypothetical. Let's say we have a person who is charged with capital murder during a burglary and we prove to you that he either knowingly or intentionally caused the death of another human being, but we didn't bring you any evidence about a burglary at all, just nothing about a burglary. Now, we haven't proved capital murder in that case, have we?

A It depends on what you're defining as capital murder.

Q Remember that I told you, for it to be capital murder, it has to be murder in the course of another offense.

A Right.

Q We aren't talking about killing a police officer or killing a fireman, but if all we prove that he caused the death of another individual, then that's just murder?

[549] A Right.

Q Okay. Murder in the State of Texas carries a punishment range of anywhere from five years up to ninety-nine years or life and an optional fine of up to $10,000.00. There's no death sentence in just a regular murder. In order for you to be qualified to serve as a juror on this case, you have to be able to consider that entire range of punishment for the offense of murder. Now, I can't give you any examples, but I

think you would probably agree with me that there are a multitude of situations in which one person could cause the death of another person knowingly or intentionally. Even though it's not self-defense and it's not an accident and it's not juktified in any way, there's still a multitude of background and surrounding circumstances that could come into play in something like that. Would you agree with me about that?

A Yes, I do.

Q Okay. What we need to know from you, Ms. Taylor, is whether—if you feel, after hearing all the evidence, that the facts [550] and circumstances justify a sentence of ninety-years or life for murder, could you give it?

A Could I give—

Q Yes, could you give it, if that's what the facts and circumstances called for?

A Yes.

Q Okay. Let's turn it around. If you felt, after hearing all the evidence, that the facts and circumstances called and justified a sentence of five years for the offense of murder, could you give that?

A Yes.

Q Okay. We aren't asking—

A I don't understand why you're asking me.

A Well, you have to us that you're able to consider the entire range of punishment. There are some people who might come in here and say, "No, there's no way I can give ninety-nine years for a murder case. I just can't do it. It's too long and I don't feel it's right." or the same thing on the five years. We have a right to know and the defense has a right to know that, since the legislature has set that entire range of punishment, you [551] could consider that entire range.

A Right. Sure. They know about the laws than I do and whatever they say, yes.

Q Okay. Now, basically what we're going to ask you to do on the guilt or innocence phase and on the punishment

phase is to listen to the evidence and base your verdict on the evidence. Now, can you tell us that you will keep an open mind as to all the evidence in this case and not make a decision until you've heard all of the evidence?

A Sure I will.

Q And base your verdict on all that evidence after you've heard it?

A Right. Yes.

Q Okay. Now, we don't have to prove—let me back up. TV shows and that kind of thing, you hear a lot about motive for murder, premeditated murder. I understand that may be the law in California. I don't honestly know, but here in Texas, we don't have to prove to you what the motive was for a murder or for any other crime, for that matter. We don't have to prove to you that it was premeditated in any way. Do you understand that?

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JOHN D. NELSON, called as a jury panel member, having been duly sworn by the Court to testify to the truth, the .whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Dr. Nelson, good morning. Let me begin by reintroducing everyone here at the tables, or most everybody here. My name is Paul Macaluso and to my immediate left is Jim Nelson.

MR. NELSON: Good morning, Doctor.

Q Way back on Monday when we were first introduced, there was another gentleman seated here. His name is Norman Rinne. The three of us are assistant criminal district attorneys here in Dallas. We work for Henry Wade who, I'm sure as you know, is the district attorney here in Dallas.

We've been designated as the lawyers to represent the State in this particular case. Now, to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are

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[603] the better citizens because they have a certain feeling about the death penalty than those who do not.

What we want to know ultimately at this time is how Dr. Nelson feels, okay? I know you've been asked this question, number fifty-six, about how you feel about the death penalty and we've given you three lines there to answer that and precious little time to think about it really. Would you share with us your feelings, Dr. Nelson, your personal feelings about the death penalty and then, secondly, your ability or inability to actually serve on a case like this and render a verdict that would result in the execution of this Defendant in this case?

Before you do that, I forgot one thing. I'm going to state one thing at the beginning. The State is actively seeking the death penalty in this case. We think it only fair to tell all the jurors initially what our position is with regard to this case. We are actively seeking the execution of Thomas Joe Miller-E1 for the offense for which he's been accused and indicted. That is, we intend to be [604] able to provide a jury, once it's selected, with the type and the qualify of evidence, Doctor, that would convince a jury in the first phase of the trial that Mr. Miller-E1 is guilty exactly as he's been charged with the offense of capital murder. Then, as you know, in the second phase of the trial where the penalty is actually returned, once again we intend to be able to provide a jury, once it's selected, with the type and the qualify of evidence that would convince them beyond any reasonable doubt that those questions should be answered yes. You know that the result of three yes answers is an automatic sentence of death, a

mandatory sentence of death under the law. The Judge has no power, of course, to override that. Now, that's our position, but, of course, ultimately it's the position of the jury that controls, but I think it's only fair to tell you in all honesty and as straight forward as we can what our position is and what we're seeking and ultimately that is, at the end of this trial that Mr. Miller-El be put to death under the law. Now, let me just go back to the question I asked you earlier. Would you share with us [605] your feelings about the death penalty and your ability to actually serve on this case, if you can?

A Yes, sir. Before I do that, I made an error on that questionnaire that's been bothering me since Monday. There was a question whether any members of my family or close friends or lawyers and I said no. I forgot about my nephew who is a city attorney in Duluth, Minnesota.

Q He's a city attorney?

A In Duluth, Minnesota.

Q Thank you for telling us that. You didn't commit even a misdemeanor by not putting that on there. Go ahead.

A I do not believe in the death penalty. I suppose this goes back to my childhood because both my parents felt rather strongly against the death penalty. I just believe -- for two reasons, probably; one, morally I don't think it's right to take anyone's life. I don't care what the reasons are. Secondly, the law isn't perfect and there are always chances for errors to be made.

Q Okay. You've stated your position

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[668] HAROLD K. SOHNER, called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning. Is it Mr. Sohner; is that correct?

A That's correct.

Q I think I was introduced to you on Monday. My name, again, is Jim Nelson. I'm going to reintroduce the other folks here. Sitting next to me is Mr. Paul Macaluso. The other gentleman who was seated over here at the table the other day, if you remember, was Norman Kinne. Mr. Kinne, Mr. Macaluso and myself are assistant criminal district attorneys here in Dallas. We've been assigned by Henry Wade to handle this case for the State of Texas.

Immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Sohner?

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[670] sometimes. If you have something that you need to say or a question on some issue I haven't made clear, please stop me and let's make sure that we're clear on things, okay?

A Yes.

Q Mr. Sohner, I feel like it is only fair to you that you know up front what our position, the position of the State of Texas, is in this case. our position is that we are actively seeking and will continue to actively seek throughout the trial the death penalty for that man at the far end of the counsel table, Thomas Joe Miller-El. We plan to present to the jury and to you, if you're on the jury,' a sufficient amount and qualify of evidence, number one, for him to be found guilty of capital murder and, number two, for the death penalty to be assessed. I feel like it is only fair, as I've said, that you know that going in, that that's what we're going to try to do. I'm not going to try to pull the wool over your eyes. Although I'm a lawyer and have been for a few years, I'm going to try not to talk too much legally or too much lawyer talk and I'm not

going to argue with you. I don't think [671] anyone is. We certainly don't mean to. Obviously, there aren't going to be any right or wrong answers to what any of us have to ask, Mr. Sohner. We're just trying to find out—I've expressed to you our feelings and we need to know—and Mr. Cunningham and Mr. West and the Judge are going to listen at the same time as I'm talking to you—your feelings on things because that's what is going to count. Obviously, we're trying to find the twelve people best suited to serve on this particular jury in the trial of Thomas Joe Miller-E1.

With that kind of introduction and opening, which tends to run a little long sometimes, you had a chance on Monday to fill out a questionnaire. One of the questions on there, as you probably remember, was number fifty-six and that's your feelings about the death penalty. You filled it out at that time and I would like you, if you would, to tell us again today exactly what your feelings are about the death penalty?

A It's a situation that I—until one is put into the position of answering that question and saying I'm going to be one of the

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[723] BILLY J. WAGONER, called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Wagoner. Mr. Wagoner, let me begin by reintroducing every one here at the table. My name is Paul Macaluso and to my immediate left. is Jim Nelson.

MR. NELSON: Good afternoon, Mr. Wagoner.

Q Mr. Wagoner, you may remember, on Monday when we were all introduced to you, there was a man seated over here. His name is Norman Kinne. Mr. Kinne, Mr. Nelson and I are assistant criminal district attorneys here in Dallas. We work for Mr. Henry Wade, who is the district attorney, as I'm sure you know. We've been designated as the lawyers to represent the State of Texas in this case.

Now, to Jim's immediate loft is Mr. Brice Cunningham.

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[728] question that you want to ask?

A No.

Q If there is something that you wish to add or a statement you wish to make because it was not asked by the rightquestions, if there's something you need to tell us, then by all means tell us, if you feel it's going to affect your service as a juror, okay?

A Okay.

Q Now, let me tell you where we stand on this case, that is the State. We are actively seeking the death penalty in this case, Mr. Wagoner. In; other words, we intend to be able to provide the jury, once it's selected somewhere down the line, with the type and quality of evidence that would convince them beyond a reasonable doubt under the law that the Defendant is guilty exactly as he is charged in this indictment. That's our burden. We have to do that and we intend to do that in this case based on the evidence.

In the second part of the trial when the penalty is determined, once again we intend to be able to provide the jury in the [729] case with the type and quality of evidence that will convince them beyond any reasonable doubt whatsoever, which again we have to do, that those three questions that determine life or death should be answered yes. Like the Judge said the other day, if all the questions are answered yes in the second part of the trial, then the law

requires that he assess a penalty of death for the Defendant. That's just our position. The reason I mention that is just to be fair to you and tell you up front where we stand with regard to the evidence. You understand from your other service what the lawyers think really doesn't matter. It's what you, as a juror, thinks and the decisions you make based on the evidence.

Now, let me just ask you, Mr. Wagoner, I know they asked you this question on the questionnaire, but let's just talk about it a little bit again. Let's just have a little informal discussion here, if we can. Tell us how you feel generally speaking, in your own words, about the death penalty and capital punishment. How do you personally feel about it?

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[754] the questions based on the evidence that you hear?

A Yes.

Q Do you see what I'm getting at? in other words, you could be on a jury and you could say, well, I think that person ought to die, you know, if I could vote, I'd probably vote for death, but the law doesn't allow you to do that, does it?

A. I wouldn't want.it to.

Q The law expects you to simply answer the questions on the basis of the evidence and put aside your personal feelings and just answer the questions. That's all.

A Very much so.

Q Can you do that?

A Yes.

Q Let's shift gears for just a second because I don't have a whole lot of time left. Let me talk to you about a situation—and I'm not suggesting that this would happen in this case, for a minute, but we have to discuss it now. Let's imagine for a moment that Mr. Wagoner is on a jury. Okay. Just imagine it for a second. A. capital murder jury [755] and let's say we've accused somebody of committing murder during a burglary,

that's capital murder that we've proven. Do you a understand that we have to prove both the murder and a burglary if we expect you to find him guilty of capital murder?

A Yes, I understand that.

Q But let's say at the end of the testimony, you say, well, I believe he committed murder. They proved that all right. Sure thing, but they didn't prove anything about any burglary or i doubt it was during a burglary. Well, you see, if that were to happen, you have to find that Defendant not guilty of capital murder. Do you understand that?

A Yes.

Q Because we didn't prove capital murder, did we?

A According to the law, you didn't prove it.

Q What did we prove?

A The murder and that was all.

Q Let's imagine for a moment if that were to happen. Let's say you're on that [756] jury and you've just found someone guilty of murder, okay, because that's what we proved. You can forget all about automatic life and automatic death in a regular murder case. Do you understand that?

A Yes.

Q The range of penalty—the law gives you a very broad range of penalty—the judge talked about this the other day—for the offense of murder. It's no longer life or death. It's from five years to ninety-nine years or life. All the law expects you to do to be qualified as juror is this, basically, is to be open-minded, as I believe you are, and be willing to tell us that you will keep an open mind until you would hear the facts of a murder case. Now, you haven't hear any evidence, have you?

A No.

Q And obviously you can't make up your mind until you have heard the evidence, can you?

A No way.

Q And that's all the law expects of you. You can just tell all of us here that you [757] have an open mind and you will

wait and listen to the evidence and, once all of the evidence is in, you will decide what the proper penalty ought to be based on what you feel is proper and justified and warranted by the evidence and the facts. Can you do that?

A Yes.

Q In other words, if you hear a murder case and you know murder is where one person knowingly or intentionally causes the death of another. That's murder. You've heard the facts of a murder case—and, you know, all murders involve a death, obviously, and they're all going to be bad. Maybe some are just worse than others, okay? The law just says that you be the type of person who would wait and listen to the evidence and, if you hear a case that calls for the minimum—after you've heard the facts, you decide it calls for the minimum punishment, you could give the minimum punishment, if you feel that's the right thing to do and the proper thing to do under the facts as you hear them, okay?

A Yes.

Q Can you do that?

[758] A Yes.

Q If you hear a case, after you've heard all the facts and you follow the law, that you feel calls for the maximum punishment in a murder, would you be able to do that as well?

A Yes.

Q Or obviously anywhere in between, just like you did in that other case?

A Yes.

Q All right. Now, let me just cover one little thing here. The range of penalty, as you know, is from five years to ninety-nine years or life and a $10,000.00 fine. Are you saying that, if you felt, after you heard the facts of a murder case—you know, some murder case, if you felt that the minimum was the proper thing, could you give as low as five years in the Texas Department of Corrections as the law allows for murder?

A From the facts that were presented, yes, I could.

Q If you felt it was the right thing to do, the proper thing to do, and the just thing to do, after you heard the facts, if you [759] said, this is a case—I never thought I'd see one, but this is it—where the minimum is five years, I'll give five years because that's a the law?

A Yes, I could.

Q All right, The same thing would hold true for the maximum. If you say, well, this is about as bad as you can get and I believe these facts are horrible and I think he should get the maximum, if the maximum is ninety-nine years or life and a $10,000.00 fine, you could do that, as well?

A. I sure could.

Q Obviously, what you're saying is, you woul d wait and listen to the f acts and you and the other jurors would tailor the punishment to fit the crime. Can you do that?

A Yes.

Q Any question about that at all?

A No.

Q Now, just one or two other things here and then these other lawyers will have a chance to talk to you, as well. I think the Judge covered this, but I'm not sure. The law allows that a person can be convicted of murder

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[829] proceedings were held.)

MR. NELSON: We would like the record to reflect that Mr. Gitchaway was a black male excused 'by agreement.

MR. WEST: Your Honor, I think that the record should reflect that I concur with Mr. Nelson,. the attorney for the State, that the record should reflect that, that Mr. Gitchaway is a black male.

THE COURT: Ask Ms. Allen to come in, please. Ms. Allen, how are you doing?

MS. ALLEN: Okay.

THE COURT: First of all, let me explain or, apologize to you. We got you here at 1:00 o'clock and we didn't get you in here—into the courtroom until about 2:30. We don't know how long it's going to take to talk to an individual when we start out, so I asked all of you

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[837] THE COURT: Pursuant to my procedure last week, I'll first ask the State if they wish a shuffle?

MR. NELSON: Yes.

MR. WEST: Could we ask the reason for the shuffle?

MR. NELSON: No.

MR. WEST: For purposes of the record, I would like the record to indicate that within the first ten jurors, prospective jurors, four are black. Within the second set of ten prospective jurors, three are black and within the third set of prospective jurors, two are black and the fourth set of prospective jurors, one is black.

THE COURT: I'll grand the State's motion to shuffle. I'll ask someone on behalf of the State and the Defendant to go down and do that as quickly as possible. I'll recess the jury and explain [922] VIRGINIA R. SMITH, called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q My name, as I was introduced to you yesterday, is Jim Nelson. I'm going to be talking with you this morning. The first thing I want to do is reintroduce all the people here. To my immediate right is Paul Macaluso. Another gentleman, who isn't here, who is home, I find out now, with the chicken

pox as a matter of fact, is Mr. Norman Rinne. Mr. Kinne, Mr. Macaluso and myself are assistant district attorneys here in Dallas. We've been assigned to handle this case for the State of Texas. To my immediate left is Mr. Royce West.

MR. WEST: Good morning.

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[1005] Mr. West. The lady—she's been in the witness bo-x for about an hour and a half with some time out when she was out in the hall, I'm going to sustain the State's challenge to this juror for cause. I'm going to note for the record that I think she was questioned very thoroughly. The Court finds that she—her basic problem, as I interpret it, was that she would just simply be unable either to take the oath initially because of her feelings about the death penalty, knowing the result of her verdict would be the imposition of the death penalty by the Court, or if she were sworn for some reason or another, then her ability would be seriously impaired or affected by her deep-seated feelings about the death penalty. Her demeanor on the stand, as you've noted; she did tend to vacillate to some extent. She appeared to be

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[1012] JAMES D. HOLTZ, called as a Jury panel member, having been duly sworn by the Court to testify to the truth, a whole truth and nothing but the truth; was examined and testified as follows:

EXAMINATION

BY MR. MACALDSO:

Q Good morning, Mr. Holtz.

A Good morning.

Q Let me begin by reintroducing most everyone who is here. I'm Paul Macaluso. This is Jim Nelson.

MR. NELSON: Good morning.

Q Once the trial beings, another gentleman will be with us and his name is Norman Kinne. Believe it or not, Mr. Kinne is about fifty years old and he has the chicken pox. He's the lawyer, as the Judge said, who is actually going to be presenting the evidence on behalf of the State once the trial begins. We are assistant criminal district attorneys who work for Henry Wade and we've been designated to represent the State, okay?

A Okay.

Q Now, you can see Mr. E. Brice

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[1016] will have to make some tough decisions on this case. We just want to know if the people that we talk to are qualified and suited to this type of case. If they're not, obviously now is the time to let us know. If you have a question, Jinn, about anything at any time, ask it.

A Okay.

Q If there is something you want to tell us, tell us, all right?

A Okay.

Q Like I said, bear in mind that no one is going to argue you in or out of a position. Just let us know how you feel.

A Okay.

Q Now, I want to let you know how we feel based on the evidence. We're actively seeking the death penalty, Jim, in this case. We make no bores about it. I'm going to tell you up front as we've told all the other—you're number twenty—what we've let all the other jurors know at this point, what our position is based on the evidence and that's this: we are actively seeking the death penalty in this case for Thomas Joe Miller-El. [1017] I'm not apologizing for it. I don't feel that we have to. We intend to be able to provide a jury in this case with the type and the qualify of evidence in the first part of the trial which would convince them beyond any reasonable doubt whatsoever that Mr. Miller-E1 is guilty exactly as he has been indicted and charged with the offense of capital murder. All right.

In the second part of the trial, we once again intend to be able to provide the jury, you if you're on it, with the type and the qualify of evidence that would convince a jury beyond any reasonable doubt whatsoever that those three or possibly two questions, whatever, should all be answered yes which, as the Judge explained yesterday, results mandatorially, automatically, in the Judge assessing, death. That's all he can receive, either death or life, depending upon the answers to the questions. Any question about that at all?

A No, sir.

Q We just feel that it is only fair to let you know what our position is, that we are taking an active role in this case for the [1018] death penalty. You understand that ultimately it's up to the jury?

A. Yes.

Q Now, Jim, you've been asked this question, number fifty-six, how you feel about the death penalty and i know they kind of spring it on you, don't they?

A The Judge warned us about it.

Q They give you three lines here and they ask you how you feel about the death penalty. Why don't you share with us, having had an evening also to think about it or to sleep on it, how you personally feel in your own words, number one about the death penalty, and then secondly about your ability to serve or not serve on this type of a case?

A Okay. if I may, I was raised in Rhode island and that's where I spent my childhood and grew up. New England, I'm sure, is noted as a fairly liberal area of the country. Icy view are fairly liberal. Icy position on the death penalty is, I believe in the death penalty in the death of a police officer on duty or, you know, an off-duty officer that is acting as a police officer and

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[1045] could render an impartial decision.

Q Regardless of whether it's a murder during a robbery, murder during a burglary, murder during a rape or whatever?

A Regardless of that.

Q Let's shift gears here for just a second and let's talk about a situation that I'm not suggesting could occur in this or any other capital murder case, for that matter, but would like to discuss it with you because it is important. Remember that I said one of the types of capital murders is a murder plus like a murder during a robbery or it could be murder during a burglary, as an example. You say you could serve on that type o-f a case?

A. Yes, sir.

Q Now, let's say you're on a hypothetical jury, murder alleged to have been committed during a burglary. Let's say you don't have any doubt whatsoever in the first phase of the trial that the murder was committed, the Defendant is guilty of murder, no question about it, it's obvious, but let's say you didn't hear any testimony about a burglary or you have a reasonable doubt. [1046] There's a doubt in your mind whether the murder actually happened during a burglary. Well, you know if you're expected to find someone guilty of capital murder, we have to prove the murder and the burglary. We've only proven the murder; is that right?

A Right.

Q You can't find somebody guilty of capital murder under those circumstances?

A No, sir.

Q You must find them not guilty of capital murder and find there guilty instead of what the State did prove, which is what?

A Manslaughter?

Q No, murder, just regular murder. Murder is a situation—and I want you to bear this in mind—where one person knowingly and/or intentionally causes the death of another

individual and that's done without any legal excuse or any legal justification. Now, I want to harp on that for just a second because I want to make sure that—you said manslaughter there and we'll talk about that in just a second. You've convicted someone of murder and we're not talking about mandatory [1047] death or mandatory life. There's a different range of penalty altogether.

A Right.

Q But I want you to understand what murder is and what murder is not. For example, I said where one person knowingly or intentionally or both causes the death of another individual without any legal excuse or legal justification. Let me give you some examples of what we're not talking about when we're thinking about murder and the range of penalty. For example, if I killed Mr. Nelson over here because I believe he is going to kill me or inflict serious bodily injury on me, I could be charged with his murder, but if you were on that jury, Jim, and you believe that I acted in self-defense or if I were on the jury and I believed that you acted in self-defense, I would find you not guilty of murder just like you would have to fine me not guilty of murder because that is a legal excuse, self-defense.

A Right.

Q So when you think about the range of penalty for murder, don't be thinking about self-defense because you don't say, well, [1048] that's mitigated. It's not mitigated. It's a defense. Do you see what I'm getting at?

A Yes, sir.

Q The same thing would hold true if you believed I killed Jim by accident. Let's say the circumstances look like murder, but if you believe or have a reasonable doubt, if you're on the jury, that it was an accident, not guilty.

A Right.

Q Not mitigation, not a lower penalty, not guilty. Don't be thinking about that. The same thing would hold true of what you said about insanity. You don't lower the sentence

for somebody because you think they're insane or maybe were insane. If you believe beyond a reasonable doubt or have a reasonable doubt about it that someone committed a homicide that would otherwise be a murder, believed they were insane, not guilty. Any problem with that?

A No, sir.

Q One last category and here's a situation that you mentioned earlier, manslaughter. Let's say you believed the [1049] situation where someone killed somebody and it would ordinarily be murder but they acted under the influence of sudden passion from an adequate cause. For example, a father comes hone and finds out that his young child had been sexually molested by a neighbor up the street who is up there laughing about it. He's overwhelmed by what he sees and he flies off the handle, picks up a gun or a pitchfork and runs up the street and kills his neighbor. If you believe that he acted under the sudden influence of passion from an adequate cause and you know that might be an adequate cause because he was so enraged, that's not murder. That's what we call voluntary manslaughter. It's a different range of penalty altogether.

Now, excluding all those things, we do not mitigate the offense. Remember we're talking about a situation where one person. knowingly and/or intentionally causes Che death of another. There's no legal excuse, no justification under the law. What do you personally feel should be the minimum number of years a person should be required to serve for that sort of offense?

[1050] A. Well, that's tough. You know, I don't know what the range of penalties are, but my personal belief is life in prison.

Q Like I said, no one is going to talk you in or out of a position.

A. Now, that is my personal belief. I don't see any number of years.

Q Okay. Now, let me ask you this: Bearing in mind what we talked about—and I'm running out of time and I'm not going to be able to go over all these categories with you. Jim, knowing yourself and in all honesty, being as honest with us as you've been to this point, the law allows a different range of penalty altogether. The law says that the range of penalty is as broad as it can be for any offense, for murder. We want to know how you feel. Do you see?

A Okay.

Q Do you feel you could ever hear fact: and circumstances where you feel it would be proper, where one person knowingly and/or intentionally—he knew and intended to kill that individual, absent of those other qualifications, those four that I gave you, [1051] would you ever under any circumstances, could any proof ever satisfy you that it would be proper that a person should receive as low as five years in the penitentiary for murder.?

A No, sir, no.

Q You feel very strongly about that, don't you?

A Yes, I do.

Q You said it should be life; is that right?

A Yes, sir.

Q Now, the law does allow you in a murder case to consider—you know; to take into consideration the facts and circumstances, but eliminating those four categorses, I gather from what you're saying; five years for a human life under those circumstances would never be proper?

A No, sir.

Q Under any stretch of the imagination?

A No. It would be inadequate in my beliefs.

Q If I ever tried to talc you into that, I would be beating my head against a [1052] wall.

A You would be talking to a stone wall.

Q I would be talking to a stone wall because that's the way you feel about it?

A Yes.

Q Like I said, I don't have the right to quarrel with you or dicker with you .about your personal feelings; Tim, or anything else for that matter. That's not our responsibility. Are you saying then, if you were on a murder case, there would be simply no way you could assess a penalty as low as five years regardless of the facts and circumstances in a murder case, knowingly and intentionally causing the death of another individual?

A No

Q You could give life?

A Yes.

Q But nothing—

A Nothing, along the line of five years. If the person was eighty years old, you could drop a sentence to forty years or something, but essentially life.

Q Jim, you've been very polite and

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[1063] Your Honor.

THE COURT: I have a call in for furor number four. T told her to come at 1:45 and since we still have to talk to the next juror—anything else, Mr. Macaluso? All the voir dire is finished; but—

MR. MACALUSO: I just want to ask Jim if he feels bad about what happened two weeks ago in New Orleans?

MR. HOLTZ: The New England Patriots? I had to cook a lobster. Dinner for some friends of mine.

THE COURT: What says the State?

MR. MACALUSO: The State will exercise a Preemptory challenge.

THE COURT: Mr. Holtz, you will e excused from service in this case. I want to thank you, first of all, for your patience with us yesterday and again today and more important than that for

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[1070] SANDRA L. JENKINS, called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Ms. Jenkins. As I was introduced to you yesterday, my name is Jim Nelson and sitting next to me, again, is Paul Macaluso. There will be a third lawyer, as.I believe the judge told you yesterday, involved in this. He is a gentleman by the name of Norman Kinne. Mr. Kinne, who I guess is around fifty years old, has the chicken pox. Because of that he's not here. He's at home trying to get over that. The three of us repiesent the State of Texas in this case. We're assistant district attorneys and we've been assigned this ,case by Henry Wade your elected district attorney.

Sitting immediately to my left is Mr. E. 8rice Cunningham.

MR. CUNNINGHAM: How are you doing, Ms. Jenkins?

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[1072] McDowell said and that is, we would like you to relax as much as you can with you upon the witness stand and all of us out here looking you.

A. All right.

Q As you talk not only to me, but the other lawyers and the Judge will be listening at the same time because the Judge is the one who has to make the final decision on this. I want you to remember one thing and that is, there is no right or wrong answer to anything anybody is going to ask you. Your answers are not going to show you to be a good citizen or a bad citizen or a good person or a bad person. We're just trying to find out about you because the bottom line is, we want twelve people over here who can serve on this type of

case. It takes, I think everybody would agree, a special kind of person to serve on this particular case because what we're dealing with is capital murder.

Capital murder has only two possible punishments, either a sentence of life or a sentence of death and that's it. I want you to understand, as we're going into this [1073] thing, Ms. Jenkins, what our position is. We, representing the State of Texas, have been and will continue to actively seek the death penalty for that man down there, Thomas Joe Miller-E1. We feel like we will be able to present to you the type and quantity evidence for you to convict him, if you're chosen as a juror, of the crime of capital murder and, once he is convicted of capital murder, answer those three questions on the board yes resulting in the death sentence for Thomas Joe Miller-E1.

So that's where we are. That's our position and that's we anticipate asking the jury to do once all of the evidence is in. Now, you, yesterday, filled out a fairly lengthy questionnaire and one of the questions on there, number fifty-six, asked about your feeling on the death penalty. I know that this was something you probably weren't prepared for and didn't have a whole lot of time to think about it before you answered the question, so I'm going to ask you again, if you would, to just put in your own words your feelings about the death penalty.
[1074] A I feel that, if it would be proven beyond a reasonable doubt that the death penalty is warranted, that's what sentence should be given. I think I went on to further explain that I think a harsher treatment is life imprisonment with no parole.

Q Okay. Now, I would guess from what you're telling me then, you feel like the death penalty serves a purpose in our society; is that right?

A Yes, very definitely.

Q What type of purpose? What pops into your mind as the purpose of the death penalty?

A The purpose of the death penalty—well, there could be several purposes. It can act as a deterrent. It obviously, from a taxpayer's standpoint, instead of sentencing someone to life in prison, it's a little less expensive, but really that is not the point even here or there. I'm a little nervous here.

Q I understand. I know it's tough to relax sitting up there and going through these things, but—

* * * *

A I'm still with you.

Q Okay. Now, one thing that we don't expect to happen and we don't anticipate happening in this case, but may happen, is that we don't prove capital murder. Let's say, for example, that we have a case where we've alleged murder in the course of a burglary and we prove to you that the Defendant knowingly or intentionally caused the death of another but we don't prove anything about a burglary, nothing at all. Therefore, we don't have capital murder, do we?

A No, we don't.

Q We just have murder?

A Correct.

Q Okay. The range of punishment for murder, just regular murder, does not include the death penalty in the State of Texas. The range of punishment for the offense of murder ,is anywhere from five years up to ninety-nine years or life in the Texas Department of Corrections, a sentence of five years up to ninety-nine years or life. In order for you to be qualified to serve as a juror on this case, you have to be able to consider that entire [1095] range of punishment if the person is convicted of murder. When I talk about murder, I'm not talking about self-defense or accident or 'insanity because, if any of those are the case, then the person is not guilty, okay?

A Okay.

Q If the killing is done in the heat of passion—for example, one incident I've heard talked about would be

where a father came home and his four year old daughter had been raped and the neighbor did it. He was standing down the street laughing about it. He goes and gets his deer rifle and goes down there and shoots his neighbor because he's so enraged by what happened. That's a killing in the heat of passion, but that's voluntary manslaughter. It's not murder. Murder is the knowingly or intentionally causing the death of another individual without any legal justification whatsoever, okay? You have to be able to consider for that type of offense the entire range of punishment.

Now, when I say "able to consider", I don't mean that you have to be able to tell us right now you will give five [1096] years or be able to tell us right now that you will give life because you haven't heard any of the facts. You don't know what the facts are at this point and we can't tell you. Now, would you agree with me that there is a myriad of circumstances in which one person could knowingly or intentionally kill another person?

A Definitely.

Q You could sit here for hours and not think of all the different things that could be involved in something like that; is that right?

A_ That's correct.

Q Okay. If you were sitting on a jury and you convicted a person of murder, not capital murder but murder, and after hearing all of the evidence and all the facts and circumstances, if you felt that a life sentence was justified by the facts and circumstances, could you give a life sentence for murder?

A. Yes, I could.

Q If after hearing all the facts and circumstances, whatever they may be, whatever may go into this offense of murder, if you believed from listening to all that, hearing [1097] all the evidence you're going to hear, that a rive year sentence is called for and justified, would you give a five year sentence?

A Yes.

Q Okay. Again, you don't have to be able to sit there right now and even think of what would constitute a five year sentence or what would justify a five year sentence. All jou have to be able to tell us is, if you saw that case, whatever it is, if it calls for a five year sentence, you could give a five year sentence and I believe you're telling me you could do that; is that right?

A That is correct.

Q So you can consider that entire range of punishment, anywhere from five years up to ninety-nine years or life—and there is also an optional fine of up to $10, 000.00 on the end of it. Are you telling me that you could consider that entire range of punishment?

A Yes. As I stated, I think punishment should measure up with the crime.

Q Right, and you're going to keep an open mind and listen to all of the evidence, all the facts of the case and everything else [1098] that's brought to you before you make a decision; is that right?

A Definitely.

Q And that's the same thing you i re going to do even if he's convicted of capital murder, listen to all the facts and Circumstances and all the evidence before you make your decision; is that right?

A Yes, definitely.

Q And that's all we're asking you to do, not to make up your mind right now, but to keep an open mind and listen to everything and then make a decision. Okay?

A All right.

Q Let me touch on a couple of other things just real quickly. Number one, the Judge talked to you about- one eyewitness. He said that the law allows us to prove a case in the State of Texas based on the testimony only one eyewitness if you—

MR. WEST: Excuse me, Mr. Nelson. Your Honor—

THE COURT: I don't believe that is one of our jurors, but you might check, Bob. You're not a

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A As long as the facts were appropriate and I, my own mind, believed that was the justification for the minimum sentence, yes.

MR. WEST: I'll pass, Your Honor.

THE COURT: Mr. Nelson, what says the State?

MR. NELSON: Your Honor, we would be very happy to have Ms. Jerkins serve as a juror in this case.

MR. WEST: We will be very happy to excuse her, Your Honor.

THE COURT: Thank you; Mr. West and Mr. Nelson. Ms. Jenkins, you've been excused frog service in this case which means you can leave here and go about your business. You don't have to stay around any longer. If you will give your badge to the bailiff, we would appreciate it, as you leave.

Off the record, Pam.

(Whereupon, there was an

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[1130] COLLEEN MOSES, called as a Jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Ms. Moses. How are you doing?

A Fire, and you?

Q I'm doing better than I was yesterday. Let me begin by reintroducing every one here. I'm Paul Macaluso. This is

Jim Nelson. You were not introduced to Norman Kinne. He's the third assistant district attorney assigned to this case. He's not here today and he wasn't here yesterday and he won't be here for three weeks because he has the chicken pox.

A Oh, great.

Q Right, and he's about fifty years old. We work for Henry Wade and we are assistant district attorneys and Mr. Wade has designated us as the lawyers to represent the State in this case. Now, the gentleman to my

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[1134] right questions and you just tell us what is on your mind, you will be doing the right thing and so will we, okay?

A Okay.

Q No one is going to play lawyer with you. That comes from a lawyer, by the way, saying that to you. We're not going to try to talk you into anything or out of anything. If there is something you want to tell us; by all means tell us, whether we touch on on it or not, if there is some question you have at any time about anything we talk about, this is the time to ask it. Don't be bashful. I don't think you will be, but relax and just—and if i don't make myself clear—I tend to really start talking fast at times, so if you don't understand me, just tell me to slow down and I'll be happy to do that.

A I'll raise my hand.

Q All right. That's a deal. Now, let me tell you where we stand in this case so we're just as straight forward with you as we've been with the twenty-one other people we've talked to at this point. The State of Texas, Ms. Moses, in this case is actively [1135] seeking the death penalty for Thomas Joe Miller-El, that man right down there. We make no bones about it and we make no apologies for 'that. The law allows it and we intend to be able to provide a jury, once the trial begins, with both the type and the quality of evidence that would convince a jury—and that would be you; if you're on this jury—that Mr. Miller-El is guilty of capital murder just

as he has been indicted big the Grand Jury beyond any reasonable doubt whatsoever. That's done in the first mart of the trial.

The second part of the trial, where the punishment is determined, once again we intend to be able to provide the jury with the type as well as the quality of evidence that mould convince them beyond any reasonable doubt whatsoever that all the questions the Judge referred to, the two or three questions .you would be asked in that phase, should be answered yes. The result of all affirmative or yes answers is that the Judge must sentence Mr. Miller-E1 to be executed. Do you see what I'm getting at?

A Uh-huh.

[1136 Q Just the same; if there is one or more no answers, the judge must assess a mandatory sentence of life. He has no latitude. The reason I mentioned it is just to put you on notice as to exactly what our position is and what we intend and hope to be able to prove through the evidence once the trial begins and basically, I guess you could say, what the stakes are in this particular case. All right?

A Okay.

Q You understand that ultimately it doesn't matter what the lawyers think, it's what the jury thinks and the decision will be made ultimately by the jury, okay?

A Yes.

Q Now, Ms. Moses, you were asked this question and you knew you were going to be asked it again, I suppose, and that's question number fifty-six and that concerns your feelings about the death penalty. I know you weren't given very much time to think about that before you answered it, but you've been able to sleep on it overnight, haven't you?

A Uh-huh.

[1137] Q Let me ask you, would you share with us; ma'am, in your own words, first your personal feelings about the death penalty and capital punishment generally and then

secondly, your ability or your inability to actually serve in a case of this type as a juror?

A Well, I believe in the death penalty, but I think that it would be—whatever decision that I came to at that time, I can't say right off the bat that I think someone should get the death penalty without knowing the circumstances and all the other things.

Q Well, no one will quarrel with you about that at all. In fact, the law—of whether a criminal offense involves the death penalty or it involves a $200.00 fine, the same things would hold true and that is, you must presume any Defendant to be innocent before you hear any evidence at all. Do you understand that?

A That's true.

Q That's the same thing for Mr. Miller-E1. It doesn't matter how bad an. indictment may sound or how serious a level of

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[1164] Q All right. That's what the law expects of you. Okay. Let's shift gears for just—I didn't forget the third question. That will only come to you if it is raised by the evidence. That just basically asks you if it is a provoked killing or an unprovoked killing. If you decide it is an unprovoked killing, you answer the question yes. If you decide it was a provoked killing, that the deceased did something or said something to provoke the killer, you decide whether the killer acted reasonably or unreasonably. You see, you can answer that question yes or no depending upon the evidence.

A Okay.

Q Let's shift gears—and the Judge is being very patient with me and I need to hurry up here. I want to talk to you about a situation that we're not suggesting would occur in any case, ma'am, but we need to cover it with you. Let's say you're on another capital murder jury. Let's say it's a murder

that allegedly occurred during a burglary. That's another type of capital murder. Do you see what I'm getting at?

[1165] A Uh-huh.

Q Now, let's say you don't have any doubt after you heard the first part of the 'trial that the Defendant committed the murder; but let's say you didn't hear any evidence about a burglary or you had a reasonable doubt about the burglary. If that were the case, Mr. Moses, you understand that, where the State did riot prove both parts of the of offense—we have to prove both the murder and the burglary if we expect you to convict him of capital murder—the law says you couldn't convict someone or capital murder if you didn't hear anything about a burglary. Do you see what I'm getting at?

A Uh-hun.

Q In which case you find the Defendant not guilty of capital -murder because we didn't prove that, did we?

A No, sir.

Q Instead you find him guilty of what we proved, which is what, murder. Now, if that were to happen and let's say that you found someone guilty of regular murder, then it's no longer automatic life or automatic [1166] death. Instead, it's a range of penalty, just like the Judge said the other day, five years to ninety-nine years or life and an optional $10,000.00 fine. That sentence, the number of years, depends entirely on the facts and the circumstances of the murder case. You know as well as I do that there could be an infinite number of situations where one person can murder another. They're all bad, but some are worse than others and the law allows you this latitude to say basically this: That you have an open mind, and I know you do; you will wait until you hear the facts of a murder case and then and only then, once you've heard all the facts, you will decide what the proper penalty should be. Like you may have said earlier or someone said, it's the old cliché about you make the punishment fit the crime. All right?

A Uh-huh.

Q The law wants you to keep an open mind and you tell us that you have an open mind and that you will consider the full range of penalty and assess the penalty somewhere within five years to ninety-nine year or life for murder after you've heard the facts of the [1167] case. Could you do that?

A Yes, sir.

Q In other words, if you hear a case to your way of thinking is proper and it warrants and justifies and calls for a sentence of five years—because that's the minimum—you will give five years for murder. Can you do that?

A Yes, sir.

Q Assuming you heard facts and circumstances that tell you it's the proper thing to do. By the same token, if you hear facts or a situation that you think calls for ninety-nine years to life and you think that is the proper thing to do, once you've heard the evidence—and you haven't heard any evidence yet, have you?

A No, sir.

Q Could you give a verdict of ninety-nine years or life for murder and an optional $10,000.00 fine if you thought that was proper?

A Yes, sir, I could.

Q Or anywhere in between?

A Right.

[1168] Q Any problem with that at all?

A No, sir.

Q I'm out of time, Ms. Moses, but let me just ask you before I let the other lawyers talk to you, do you have any reason whatsoever, whether I've covered it or not, why you couldn't be fair to both sides in this particular case?

A No, sir, I do not know of any reason.

Q Any reason whatsoever why you couldn't give Mr. Miller-El a fair trial here and make the State proves its case beyond a reasonable doubt? Will you make us to that, ma'am?

A Yes, sir, I would.

Q You would keep that open mind?

A Yes, sir, I would.

Q I think you will, too, Ms. Moses. You've been very polite and kind to me.

MR. MACALUSO: I'll pass the prospective juror.

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[1207] PENNY M. CROWSON, called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Ms. Crowson, as yesterday, my name is Jim Nelson and I'm an assistant district attorney here in Dallas County. The man next to me is Paul Macaluso. Another gentleman who will be involved in this trial, if and when he gets over the chicken pox, which he has, is Norman Kinne. Mr. Kinne is another chief felony prosecutor with our office. The three of us are employed by Mr. Wade and have been assigned top this case to handle it for the State of Texas.

Directly to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Hi. How are you this afternoon?

MS. CROWSON: Fine, thank you.

Q Sitting next to hire is Mr. Royce [1209] here and be asked the questions and discuss things out there in front of forty or fifty other people. Our hope is, by doing it this way, because there are some very strong feelings one way or the other and some very difficult issues involved, that you will feel a little bit more comfortable in answering th questions we have for you.

There are no right or wrong; answers to anything I may ask or the lawyers ask you or the Judge asks. We're just trying

to find out what you think and how you feel about certain thing. If you will be honest with us and answer the questions as openly and as forthrightly as you can, that's all we ask of you. Okay?

A Okay. I'll do my best.

Q As I told you this Defendant is charged with the offense of capital murder. I think it is only fair to you that you know going in what our position is. Our position is we have been and will continue to actively seek the death penalty for Thomas Joe Miller-E1, the man at the far end of the table down there. We feel like we will be able to present to the [1210] twelve persons on this jury the type and quality of evidence sufficient, number one, to convince you that he is quilty of the offense of capital murder. Then when we move to the punishment phase to convince you that each of those questions there should be answered yes.

When each of those is answered yes, the result is the Judge assesses the death penalty. We're talk about those a little more in a few minuts. You had a chance yesterday to fill out this questionnaire and one of the questions related to your feelings about the death penalty. I would guess that it was kind of sprung on you without warning. You didn't know what you were coming in here for really and you didn't have much chance to think about it. Now, that you've had time to sleep in it a little bit, would you tell us again in your own. words how you feel about the death penalty?

A I feel that—you want to know what my decision would be or what the crime would have to be before I would go with that or—

Q That's part of it. But number one basically, you said you were in favor of

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[1252] lawyers here at the side for a second.

(Whereupon; there was an off-the-record discussion between counsel and the Court, after which the following proceedings were held.)

MR. NELSON: Your Honor, the State will exercise one of its challenges.

THE COURT: Thank you, Mr. Nelson. Ms. Crowson, you will be excused from service in this case which means you may leave here and go about your business and give your badge to the plaintiff. I want to thank you for your service and your patience with us. It's been along day and we're still working and we're going to be working for a while longer. I appreciate your patience with us. Thank you.

Ms. Smale, I won't take but a second to say what I want to

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[1255] GWENDOLYN M. SMALE, called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good late afternoon, Ms. Smale. We're all getting a little bit punchy here.

A That's why 1 wondered if every one is going to look alike.

Q I will get right to the heart of the matter by reintroducing every one here. I'm Paul Macaluso and this is Jim Nelson. When the trial begins, we will be joined by Norman Kinne who, you being a doctor's wife can appreciate the fact that Mr. Kinne is about fifty years old and has the chicken pox.

A I had them at thirty, so I can sympathize with him.

Q He's going to be out for about two or three weeks, so this jury selection better. take at least that long.

To Jim's immediate left, ma'am, is Mr. E. Brice Cunningham.

* * * *

[1258] questions, we'll be doing our job and you will be doing yours. No one is going to try and talk you into anything or out of anything. Just let us know how you feel.

If there is something that we don't touch on that you feel is important, you tell us. If you have a question about anything, by all means ask it and we'll do our best to answer it.

Let me tell you what our position is based on the evidence. The State of Texas is actively seeking the death penalty in this case for this Defendant. We make no bones about it. The law allows for it. There is no question about that. We intend to be able to provide a jury, once it's selected, and it could mean you, with both the type and qualify of evidence that would convince them beyond any reasonable doubt that the Defendant is guilty of capital murder exactly as set out in this indictment. That's done in the first part of the trial.

Then again in the second part of The trial, we intend to provide a jury with the type and quality of evidence that would [1259] convince them beyond any reasonable doubt that all the questions should be answered yes which, as you know from what the Judge said yesterday, would require the Judge to assess a sentence of death for Mr. Miller-El. That's the reality of this situation. Although we've been kind or cutting up here a little bit, bringing it back to hone as to where we are and what this is all about, it's simply that. We intend to be ableto provide—

THE COURT: Ms . Smale, let me ask you, if you would, ma'am, to step down and go in the jury room for a second and let me take care of a law matter and we'll get you right back on the witness stand.

(Whereupon, Ms. Smale left the courtroom, after which the following proceedings were held.)

THE COURT: The Defendant needed some medicine.

(Whereupon, Ms. Smale returned to the courtroom [1260] and the following proceedings were held.

THE COURT: Go ahead, Mr. Macaluso.

Q Back to what I was saying, the reality of the situation is—I don't need to tell you that it is a very serious situation that requires certainly the utmost concern of every one who would be a prospective juror in this type of case.

Strong feelings, of course, enter into this type of situation, to a large degree the penalties and the nature of the offense. You were asked this question, number fifty-six, how you feel about the death penalty and Lord knows you were given precious little time to really reflect on that. You've had overnight, so let me just ask you if you would share with us—because we're all interested, of course. Could you share with us in your own words how you feel about the death penalty and capital punishment basically and generally speaking and then your ability to actually serve on this type of jury or your inability to serve, if you feel you cannot?

[1282] will only receive the first two questions in which case you answer those. Two yes answers it's death mandatorially. That question basically asked you whether or not when he killed him was he provoked to kill him. If you find that there was no provocation, of course, you answer the question yes. If you find that there was something that the victim did or said to provoke someone into killing him, even though it's not a defense, you decide whether it was reasonable or unreasonable for the Defendant to kill this individual. If you find that it was unreasonable, you answer the question yes. If you find that it was reasonable, you answer it no. That's a confusing sort of question; isn't it?

A Well, the way it is stated, but I assume what you're saying is, was the killing by the Defendant based on just cause by an act of the deceased.

Q Right. In any case, you can see how these question can be answered yes or no depending on the evidence?

A Right.

Q Let's shift our gears for just a [1283] second and go back to something we talked about earlier and that's a situation where you would be called upon to consider the range of penalty for the offense of murder. Remember that I said regular murder? I'm not suggesting, Ms. Smale, that this would ever occur in this case or any particular case, but it's something like the other things we've been talking about. We have to discuss it.

Let's say for example, Ms. Smale, you're on a hypothetical jury. It's a capital murder indictment, but it alleged that it is a murder during a burglary which is a type of capital murder, murder plus burglary. Let's say you don't have a single doubt whatsoever nor do the other jurors that the Defendant committee murder. You didn't hear any testimony about any burglary or you have a reasonable doubt about whether it was done during a burglary. Do you understand that for us to expect you to convict someone of capital murder, we have to prove both the murder and the burglary and we didn't do that,did we?

A You said you didn't.

Q Okay. In which case, you couldn't [1284] find him guilty of capital murder. You would find him not guilty of capital murder because we didn't prove capital murder. You found him guilty of what we proved which is what? Murder. All that does is change the range of penalty back. It is no longer mandatory life or death. Instead it's that range of penalty we talked about earlier. It's as broad as any range for any offense under the laws of this state. Broad, I think, because the legislature had in mind what we all know and that

is, one person can kill another. In other words, commit murder under a myriad, and infinite number, of facts and situations. The law allows a juror, a jury as a whole, to take into consideration all of the important surrounding facts and circumstances in deciding what the proper penalty ought to be. It's kind of like tailoring the punishment to fit the crime. It's a cliché, but it's true. That's what the law expects you to do.

Now, I know you haven't heard any testimony at all on which to base a decision, have you?

A No.

[1285] Q And that's what the law says. The law expects you, to be a qualified juror on a murder case, to number one tell us that you can follow the law in regard to what the range of penalty is. Secondly, that you will keep a completely open mind and wait until you've heard something on which you can base a decision and that is the facts, rights?

A Right.

Q If you hear a fat situation to your way of thinking that calls for and warrants and basically justifies a particular number of years, that's what you will give after you've heard the evidence. Fair enough?

A All right. I think that's what is on the questionnaire.

Q In other words, even though you can't consider—or let's say conjure up in your mind now a fact situation that calls for the maximum or a fact situation that calls for the minimum, you're open-minded. You're open-minded, aren't you?

A Yes.

Q You haven't heard any evidence and you will just tell us that you will wait and [1286] listen and if you hear a fact situation that, to your way of thinking, is proper and calls for and justifies the minimum and the minimum is five yearsm you'll give five years if you feel that's what is called for. Can you do that?

A Yes.

Q If you hear a fact situation that calls for the maximum, ninety-nine years or life, and you think that's the proper thing to do, you would actually vote for ninety-nine years or life and even add on the $10,000.00 fine, which is an option. Can you do that?

A Yes.

Q Bear in mind that doesn't mean that you have to sit there and think of a fact situation or you're being committee to anything. All you're saying is, I know what the law is and I'll follow the law whatever that is. I will wait until I hear the facts and I will do what is proper once I've heard the facts.

A That's right.

Q Any proplem with that at all?

A No.

[1369] RONNIE LONG, called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Mr. Long. As I was introduced to you on Monday, my name is Jim Nelson. Sitting next to me is Mr. Paul Macaluso. There is one more gentleman who will be involved in this trial when we start the evidence and that is a man by the name of Norman Kinne.. Mr. Kinne is about fifty years old and he is home with the chicken pox and has been for a few days and probably will continue to be for a few more.

The three of us, Mr. Kinne, Mr. Macaluso and myself, are assistant district attorneys assigned by your elected district attorney, Henry Wade, to handle this case for the State of Texas.

Immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good

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[1372] in—I feel like it it only fair that we tell you our position in this caase. The State of Texas, meaning Mr. Kinne, Mr. Macaluso and myself, is actively seeking the death penalty in this case for Thomas Joe Miller-El. We anticipate that we will be able to present to a jury the quantity and type of evidence necessary to convict him of capital murder and the quantity anf type of evidence sufficient to allow a jury to answer these three questions over here in the affirmative. A yes answer to each of those questions results in an automatic death penalty from Judge McDowell. We'll talk more about that in a few minutes, but that's our position.

You had a chance on Monday to fill out a questionnaire and one of the question on there was your feelings about the death penalty. I would guess that was kind of surprise, that this whole thing was kind of sprung on you on Monday without much warning and you didn't have a whole lot of time to think about your feelings about things. You've had a couple of days now, a couple of nights to sleep on it. w uld you tell us again in your [1373] own words how you feel about the death penalty in tine State of Texas?

A Do you mean whether I'm for or against it?

Q Are you for or against it and do you feel it serves a purpose in our society?

A I do feel it serve a purpose as a deterrent toward crime.

MR. WEST: T can barely hear you, sir.

A I do feel that it is a deterrent toward criminal activities.

Q Mr. Long, is this something that you had thought about before Monday?

A Yes.

Q Is this a belief that you have held for quite a period of time?

A Yes.

Q Okay. I see you're married; is that right?

A Correct.

Q Would you venture a guess as to how your wife feels about the death penalty?

A I really haven't thought much about that.; but I would not think she would be

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[1390] burden of proof on proving the case in the first place; the capital murder offense?

A Right.

Q Okay. Mr. Long; I want to talk toyou about one other thing that we don't anticipate will come up in this case, but it is always a. possibility. That is—let me take a different situation. Let's assume we have a murder that we have charged, a murder being committed in the course of a burglary. That would be a capital murder charge according to the lawn in the State of Texas; right?

A Right.

Q Let's assume that we proved to you that the Defendant knowingly or intentionally caused the death of another individual, but we don't bring you any evidence whatsoever of a burglary. Now: we haven't proved capital murder then at that point, have we?

A No; sir.

Q All we have proved is murder?

A Right.

Q If all we prove is murder, the death penalty is no longer an option in that[1391] particular case. The range of punishment changies drastically. The range of punishment for under is any where from five years up to -ninety-nine years or life and a fine of up to $10,000.00. That's the widest range of punishment for any offense under Texas laws. Would you

agree with me, Mr. Long, that there are just a myriad of circumstances under which a murder can be committed, all kinds of factors that could come into it and be surrounding circumstances in the killing of another human being?

A Yes, sir.

Q Okay. Now, I want you to be clear about one thing. We aren't talking about self-defense, then the person is not guilty of murder. If the jury finds that it is an accident, the person is not guilty of murder. If the jury finds it is a killing under the heat of passion, he's not guilty of murder. He's guilty of voluntary manslaughter. Those are all different. What we're talking about is knowingly or intentionally taking the life of another human being without any legal justification or [1392] excuse. Other factors can come in from all over the place. All kinds of other circumstances can enter into it, but no legal justification or excuse. Are you with me so far?

A Yes.

Q In order for you to be qualified to serve as a juror on this case, you have to tell me, Mr. Macaluso, the lawyers for the defense, and the Judge that you can consider the entire range of punishment for the offense of. Murder. Now, when I say consider; I don't mean you have to be able to tell us right now I'll give five years. You don't have tobe able to tell us right now that you would give life because you haven't heard any of the facts in this case and obviously you can't make a decision until you've heard all of th evidence you're going to hear. Would you agree with me on that?

A I do.

Q What we're asking is, if you feel, after haring all the evidence, that the person is guilty of murder, if the facts and circumstances justify it and call for it in [1393] your mind, could you assess a ninety-nine year or a life sentence for the offense of murder?

A Yes.

Q Let's go to the other end. If after you've heard all of the evidence and you found the man guilty of knowingly or

intentionally causing the death of another individual without any legal excuse or justification—you've now heard all the evidence you're going to hear on the guilt or innocence and on punishment—if you feel, after hearing all of that, that the facts and circumstances Justified and called for; In your rind, a five year sentence, could you consider and give a five year sentence for the offense of murder?

A Yes, sir.

Q If the facts and circumstances justified it after you heard all of the evidence; is that right?

A Yes.

0 So all we're asking you to do is keep an open mind as to the entire range of punishment until you've heard all of the evidence. Do you feel like you could do that?

[1394] A Yes. sir.

Q Okay. Now, we don't have to prove to you, Mr. Long, in either phase motive or premeditation. I think the Judge told you that the other day. Those are not issues in a murder case in the State of Texas. You hear about them on TV a lot. I guess maybe they're issues in California, but they aren't here. We don't have to prove why the killing happened, although we may. It's not a burden. We don't have to prove to you a motive. We don't have to prove to you that it was premeditated. Do you have any problem with that?

A No, sir.

Q The law also allows us to prove a case with a single eyewitness. Would you agree with me that there are cases like that, a purse-snatching or a rape, where there may only be the person that did it and the victim of the crime there at the time?

A Yes, sir.

Q That's why the law allows us to prove a case with only one eyewitness. If you believe that eyewitness beyond a reasonable doubt as to each element of the offense, you're

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[1437] LINDA M. BERK,

Called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows"

EXAMINATION

By MR. MACLUSO:

Q. Ms. Berk, let me begin by reintroducing every one here. I'm Paul Macaluso. This is Jim Nelson and when the trial itself begin, you will be introduced to a gentlemen by the name of Norman Kinne. He's not here because he has, of al things the chicken pox.

A. Sounds like he teaches first grade.

Q. He's about fifty years old, too, and we're giving him a lot of ribbing. He will actually be presenting the evidence to the jury once the trial itself begin. We are all three assistant criminal district attorneys here in Dallas. We work for Henry Wade who is the district attorney, as I'm sure you know. We've been designated as the lawyers to represent the State.

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[1441] one and you're not there to—if you just tell us exactly and precisely how you feel as honesty as you can tell that's all that that's all any once ask and you'll be doing you r job as I said earlier, Now, if you have a question about anything, then by all means ask it. If you have something that you would like to tell us, chime in at anytime because your opinion, really—I'm not trying to patronize you. Your opinion is the most important opinion here right now. They've all heard me speaking for a couple of weeks. They know me. They don't need to hear from me. They need to know how you feel.

Now, let me tell you exactly what our position is, Ms. Berk, with regards to this case. You know that Thomas Joe Miller-El is charged with capital murder. From what you may recall the judge saying on Monday, you know that a person who is convicted of capital murder can receive only on of two possible penalties. One is a sentence of death, which is carried out by the execution of an individual through the injection of a lethal substance. The other sentence is life. There [1442] is no in between for a person convicted of capital murder.

I don't mean to be unnecessarily graphic about this, but I think it is only fair that you and any other juror we talk to—to let you know exactly what the stakes are and to acquaint you and familiarize you as much as we can with what really is going on here.

Let me start by saying this: The State of Texas, that is, Mr. Kinne, Mr. Nelson and myself on behalf of Dallas County are actively seeking the death penalty for Thomas Joe Miller-El in this case. We make no bones about it. That's our position based on the law and based on the evidence. We intend to provide a jury in this case, once it is selected, with the type and quality of evidence that will convince them beyond any reasonable doubt whatsoever in the first part of the trial that Mr. Miller-El is guilty exactly as he's been indicted of the offense of capital murder.

Then in the second part of the trial, we intend to be able to provide a jury, once it is selected, with the type and qualify [1443] of evidence that would convince them beyond any reasonable doubt that the questions that will be submitted to the jury should be answered in each case yes which, as you may recall from what the judge said yesterday, would require the judge then to assess mandatorially a sentence of death by lethal injection. Do you see what I'm getting at?

The reason I say this is, I've read your questionnaire and I've got kind of a handle on how you feel about things. We'll discuss some things in just a minute, but I want you to understand, what I think you allready know, clearly and that is, this is not something that you're reading about. It's not something you're discussing over coffee with friends when you're debating over whether it may be. You are in the thick of it, so to speak. Because we have this opportunity now to talk to prospective jurors like yourself, we get to find out whether or not just qualified generally for jury duty, but whether or not they're suited for this type of case.

I know I'm running on here, but [1444] we've talked to twenty-six people in this case in preparation for this jury selection and we have two jurors so far and one is kind of iffy because of a medical problem. If you just look at the arithmetically, it's very very small percentage of the people that we talk to that are ultimately both qualified and suited for service on a capital case. I think you know why. You know why, don't you? So what we need to do is see how you feel and see whether or not you're qualified. I'm sure generally speaking you're probably qualified for most any type of jury service, but you may not be suited for this type of service. Like I said earlier, arithmetically so far, if you go on the basis or the number we've talked to and the number of jurors we have, one in thirteen of you. That doesn't make the twelve other ones who are not going to serve on this jury bad citizens or anything like that. Do you understand that, of course?

A Yes, sir.

Q There's no doubt about that. It just means for one reason or another they simply were not suited or qualified for this [1445] type of jury service. That's what we're about here and that's what we need to talk to you about.

Now, I notice on your questionnaire with regard to question number fifty-six where you were asked how you feel about the death penalty. I sense, at least, just from the way

you're kind of fidgeting up there, you've got some real strong feeling about this?

A. I came to grips with that yesterday.

Q. Tell us, if you would, in your own words how do you feel about the death penalty and then, secondly, your ability, in all honesty, or inability to actually serve on a of case of this type and actually render a decision that would result in the execution of another citizen?

A You're going to have to excuse me because I'm getting a little emotional, okay?

Q. There's no need—okay.

A. I know, but you see I have never come to grips with this before. I remember especially during the Manson trial—I lived

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[1480] DOMINICK DESINISE,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Mr. Desinise. As I was introduced to you on Monday, my name is Jim Nelson and sitting next to me again is Mr. Paul Macaluso. As the trial moves onto the stage where we actually present evidence another man will be joining us and his name is Norman Kinne. Mr. Kinne, who is about fifty years old, is home with the chicken pox and has been for a few days and I guess will continue to be for a few more. The three of us are assistant district attorneys in Dallas. We've been assigned by Mr. Henry Wade, your elected district attorney, to handle this case for the State of Texas.

Sitting to my immediate left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you this afternoon?

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[1483] that is, there are some difficult issues and not everybody is suited to serve on this type of jury. That's what we're trying to find out, is whether you're the kind of person that is not only qualified, but suited to serve on his type of jury.

I feel like you have a right to know right up front what our position is. Mr. Kinne, Mr. Macaluso and myself, representing the people of Dallas County and the state of Texas, are actively seeking the death penalty for Thomas Joe Miller-El. We feel like we will be able to present to a jury and to you, if you're on that jury, sufficient type and quantity of evidence to convince you that he is guilty of capital murder and the sufficient type and quantity of evidence to convince you that the three questions there on those boards should be answered yes, the result of that being the death penalty. If each of those questions is answered yes, Judge McDowell has no option whatsoever but to assess the death penalty.

We do that with the anticipation that, when the death penalty is assessed, at [1484] some point Mr. Thomas Joe Miller-El—the man sitting right down there—will be taken to Huntsville and will be put on death row and at some point taken to the death house and placed on a gurney and injected with a lethal substance until he is dead as a result of the proceedings that we have in this court on this case. So that's basically out position going into this thing. I think it is only fair that you know that. That's all the introductory type of talk I'm going to do.

You had a chance on Monday to fill a questionnaire and on of the questions on there, number fifty-six, asked you your feelings about the death penalty. You put that you do not believe in the death penalty.

A. I did.

Q. Can you kind of put in your own words your feelings about the death penalty?

A. We're all big guys. We all talk, yes, if somebody did something, we're going to do out and we're going to kill them, but when you make up your own mind, even though I'm a Vietnam vet and I was not in a combat zone, I was in construction with the engineers, I've seen

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[1519] JOE A. WARREN,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Thank you, Your Honor, and good afternoon, Mr. Warren. Mr. Warren, let me begin by reintroducing everyone to you. I'm Paul Macaluso. This is Jim Nelson.

MR NELSON: Good afternoon.

Q. When the trail begins, we will be joined by Norman Kinne. Mr. Kinne, along with the rest of us here, are assistant criminal district attorneys here is Dallas. We work for Henry Wade who, I'm sure you know, is the district attorney for Dallas and Mr. Wade has designated us to represent the State of Texas. Mr. Kinne, to our surprise, contracted the Chicken Pox. He's about fifty years old, so we're kind of ribbing him about it. I guess it's not really funny that he came down with it because he's got the Chicken Pox and we'll probably join him in the next couple of weeks.

[1520] To Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Warren?

Q. To Mr. Cunningham's immediate left is Mr. Royce West.

MR. WEST: Mr. Warren, good afternoon.

Q. You may recall that they are the defense attorneys who have been appointed by His Honor, Judge McDowell to represent the Defendant who is charged with capital murder. His name is Thomas Joe Miller-E. He's in the powder blue suit and you may be able to see him from where you're sitting, He's charged with capital murder.

The reason I've taken time to reintroduce everyone here is to reacquaint you with the roles we play, who we are and what we do, and simply to ask you if you recognize any one of us, Mr. Warren, other than from the other day?

A. No. I've probably seen each of you.

[1521] Q. Going down the halls or something like that?

A. Yes.

Q. You don't know anything about this case, do you?

A. Not that I can recall.

Q. As you well know, Mr. Warren, you are a prospective juror in this case. We have two jurors, but on is kind of iffy because they may have a medical problem. Basically We have two jurors, but we need ten more before we can start. We've talked to—you're the twenty-eighth person that has been assigned to service in this case and we only have two jurors, so you can see how laborious and time-consuming this is.

Now, the whole purpose of this process we're going through is to ultimately try to find the twelve people that both sides feel are best suited and best qualified for this type of very serious case. You know that Defendant is charged with capital murder. That's the most serious level of all crimes under the laws of this state. It's obviously serious because of the nature of the offense.

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[1527] he went ahead and killed anyway; is that right?

A. Yes.

Q. I gather you feel very strongly about human life, I gather , in that regard?

A. Sure.

Q. We're talking about murder?

A. Yes.

Q. What sort of crimes, if you can think of any—and if you can't, that's fine, but just let me know. What sort of crimes do you feel it would not be warranted? You said some cases yes and some cases no. Are you saying, if he didn't have a choice, you don't think the death penalty is warranted?

A. I would say in some case, if you were—in self-defense sometimes, then I would say no.

Q. Let me talk a little bit about murder and capital murder. First off, you can only receive the death penalty in Texas for the offense of capital murder. It's a very, very special type of murder. Years ago you could get the death penalty for rape and you could get the death penalty for armed robbery and some other offenses, I think. But under the [1528] law that is in effect in Texas today, the only offense that can receive or potentially receive the death penalty for is a capital murder.

Capital murder starts off basically with what we know as the offense of murder. I'll call it regular murder even though that law doesn't agree with that. It just calls it murder. Murder is a situation where one person knowingly or intentionally causes the death of another individual without any legal excuse or any legal justification. Murder, as I've described it, is not a capital offense. It is not an offense for which a person, under the laws of Texas, can receive the death penalty.

For example, if I knowingly and intentionally cause the death of Mr. Nelson without any legal excuse or justification, that may be murder. Unless it's committed under certain circumstances or Nelson is a particular class of individual like a fireman or a police officer, then all it is—I shouldn't say all it is because it's obviously very serious. It is not capital murder. Am I making myself clear?

[1529] A. Yes.

Q. All right. You can't receive the death penalty for that type of a murder. On the other hand, if you commit murder, knowingly or intentionally causing the death of somebody and you murder somebody who is a policeman or a fireman or a jail guard, and those people are acting in the lawful discharge of their duties—their on the job, in other words—and they're killed, then murder is elevated, raised up to the level of capital murder and you can receive potentially the death penalty for that. Do you see what I'm getting at?

A Yes.

Q. Some other types of capital murder would be murder of a bunch of people, mass murders. That's new under the law. Do you remember when there were six or seven people killed in a bar about two years ago?

A. Yes.

Q. That could be a capital murder under the law. Or if you kill somebody of hire, if I hired Mr. Nelson to kill Mr. Cunningham, I could he tried for capital murder for hiring him and be could be tried for doing [1530] the actual killing. Both of use could get the death penalty for hiring yourself out as a killer. Or, as we've alleged here in this indictment, if you commit murder while you're either attempting to commit or are actually committing another felony offense. If you murder someone while you're robbing them, if you murder somebody while you're burglarizing somebody's home, if you murder somebody by arson or you kidnap somebody that you murder. Do you see what I'm getting at?

A. Yes, sir.

Q. We call that murder plus. Right off it's a murder plus another very serious felony offense. How do you feel about this Do you feel those are the types of cases, generally speaking, where you feel the death penalty would be appropriate, depending on the facts and circumstances?

A. Well, there again, I would say it depends on the case and the circumstances involved at the time.

Q. Okay. But depending upon those things that you mentioned earlier, do you feel, for example, a murder during a robbery where a [1531] person had a choice to kill or not to kill? Do you see? Do you feel that would be the type of case that you feel the death penalty would be warranted in?

A. I think if you hand a choice, you know.

Q. Now, let me ask you: Have you ever felt differently about the death penalty at all? Have you ever felt it wasn't the thing the to do or it wasn't—we didn't need it or we shouldn't have it?

A Well, there again, it goes back to the situation, you know, sometimes.

Q. You know, some people have just a general disapproval of the death penalty. I know some people go down to Austin to lobby against it and I have it repealed. You never were like that, I guess?

A. No. I've never—you know, just as far as generally speaking, I've never.

Q. You feel it's proper on a case-by-vase basis; is that right?

A. That's the way I look at it, depending on the individual case.

Q. Let me ask you: Do you see it [1531] serving a particular purpose in our society? Do you think it accomplishes anything in particular?

A. Yes and no. Sometimes I think it does and sometimes I think it don't. Sometimes you have to mixed feelings about things like that.

Q. What do you think it accomplishes when you feel it does?

A. I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have a mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment.

Q. In other words, you feel under certain circumstances the death penalty would be bad, but being locked up in a cage would be a whole lot worse and be more punishment; is that what you're saying?

A. Yes. In some cases you feel like maybe if the person were to suffer in some other way maybe. Maybe I'm not being specific, [1533] but sometimes, you know, you feel maybe this is not really punishing the person to give him to death penalty.

Q. It's over?

A. Yes, it's over and, you know, they're not really suffering from it.

Q. Let me ask you this: You're a married man, aren't you?

A. Yes, sir.

Q. Do you know or would you hazard a guess how your wife feels about the death penalty?

A. No, I don't because we've never really disscussed it.

Q. It's not something that everyone sits down and hashes out, but sometimes people know or have a feeling. If you had to hazard a guess, if you guessed, what do you think her feelings would be?

A. Well, if I had to guess, I would say probably it would depend on the situation.

Q. You've got three children; is that right sir?

A. Yes, I have

Q. On of them is grown, though. [1534] Almost all of them are grown, aren't they?

A. I have one still in high school.

Q. Let's talk a little bit about the procedure in a capital murder case. You understand that under the old laws when a capital murder case was tried, the jury decided in the first part, of course, as they do today, whether the person is guilty or not quality based on the evidence. If the State proves the indictment to the jury and the jurors has taken an oath to a true verdict render according to the law and according to the evidence, it would mean simply this: If they proved the case to you that the man is guilty, you find him guilty. Can you do that?

A. Yes.

Q. And if we didn't prove it to you, obviously, if you had a reasonable doubt about one of the accusations, you would find him not quality. Could you do that as well?

A. Yes

Q. Just call it the way you see it. That's all that would be expected. How, in the second part of the trail under the old law, the jury might hear more evidence and they might [1535] not. They might just learn about what happened in the offense itself. Under the old law, after you heard all of the evidence, the jurors would decide directly whether a person should receive the death penalty or a life sentence or some number of years. If you someone ought to die for what you heard and the others agree to it, that's what he got, or life or whatever it was, if the jury unanimously agreed. Could you do that if you were called upon to do that? Could you make that decision?

A. I think I could.

Q. Okay. How, that's kind of a trick question because the law doesn't allow you to do that any longer, directly. You don't decide directly whether someone should die or get a life sentence or a number of years. In fact, you can't even consider a number of years. Instead, they give you at the end of the trial—after you've heard all the evidence, the Judge

will give you two or three questions to answer based on the evidence and the State has the burden of proof that the questions should be answered yes. If they prove they should be answered yes, you answer [1536] them yes. Just like you would have to find the man guilty in the first part, you answer the questions yes if we prove that they should be answered to you in the second part. Any problem with that at all?

A. No.

Q. If we don't, then you, as a juror, are required to answer the question no. Could you do that, as well?

A. Yes.

Q. Do you understand the effects? All yes answers, that's the same as if you had written in the death because the Judge—if you write yes, yes, yes, the Judge will automatically, under the law, assess a sentence of death to the Defendant. He can't say, "No, I don't agree with that. I'll give him a life sentence." You see, it's automatic. You're not writing death, but three yes answers equal death. Make no mistake about it. Could you do that?

A. Yes, I could.

Q. All right. The same thing, one or more no answers equals a life sentence. Whether the Judge agree with you or disagrees [1537] with you, you'll never know anyway because he's not going to say that, what his feelings are. With all due respect to the Court, he's not in a position to tell you whether he agrees or disagrees. Now, you said you could that, as well?

A Yes.

Q. All right. Let's look at the three questions. Take whatever time you need to read those, Mr. Warren, and we'll talk to you about them in a little bit more detail.

A. (Juror complies.)

Q. Any questions about those at all?

A. No.

Q. The first one, I think, is pretty much self-explanatory. It asks you whether the Defendant acted deliberately with the

reasonable expectation that the victim would die. You say you could answer that question yes or no once you hear the facts of the case?

A. Yes.

Q. If you hear facts that convince you he acted deliberately, if you hear facts that convince you that he acted with the reasonable expectation that someone would die, [1538] you answer the question yes. If you don't, you answer the question no. Any problems with that?

A. No.

Q. How about number two? What do you think is being asked there, Mr. Warren?

A. In my opinion, I'm being asked would this person be a treat to society later.

Q. The key word there is probability. What do you think that words means to you in that context?

A. Maybe a chance or something like this.

Q. Is there a chance that the Defendant would commit—it doesn't say a particular offense, does it?

A. No.

Q. It doesn't say another murder, another capital murder, rape, robbery, burglary or an assault. It says criminal acts of violence. That may be self-defining. It may mean what it says it means, an act of violence. Is there a chance he will commit an act of violence, a crime, in the future? Do up necessarily agree with that?

A. I suppose there's always that [1539] chance, but there again, you never know.

Q. Well, do you think that question can be answered yes or no? Would you be able to answer that question yes or no depending upon the evidence you hear?

A. Based on the evidence, I would answer it accordingly.

Q. Let me ask you this, Mr Warren: Could you share with us what you feel would be the most valuable to you the permit you to answer that question yes? What would you want to know about somebody to decide whether or not this is

a type of person, you know, that you would feel good about answering the question yes, "Yeah, I think there is a chance that this guy is going to commit some crimianl act of violence in the future."? What would you want to know about?

A. What would I want to know?

Q. Yes. I'm putting you on the spot, aren't I?

A. That's really hard to say, as far as being specific, what I would like to know. I guess probably I would have to know some of the background of the person, maybe something [1540] that happened in the past or something like this.

Q. Criminal background, had he done something like this before?

A. Something like this in the past, you know.

Q. That he's done some other violent acts in the past?

A. Yes.

Q. Let me ask you: Do you think you could learn enough when you learn about what he did during the offense itself? For example, you learn about the crime itself, the capital murder itself, what he did, for example, before, during and after, like did he plan it, did he participate in the planning, pick out the victim, the location. How about the crime itself, did he actively participate in it or was he the get-away driver? Do you see? Was he a leader or was he a follower? Was he calling the shots or just standing by? Did he have—like you said earlier, did he have to do what he did? Was it necessary what he kill this individual? Do you see what I'm getting at?

A. Yes.

[1541] Q. Okay. Then afterwards, you decide whether or not—how did he react to the whole thing? After killing this individual, if he did was he feeling bad about it, crying unhappy about it, or was he nonchalant, was he blaze, another day at the office, he just didn't care. If you learn all about the offense itself, do you think you could learn enough about a person if you learn all about what he did before, during and

after a crime, would it satisfy you that, "Yeah, there's a chance that this guy will probably do something like this again given the chance"? Do you think you could do that?

A. Sure, there's a possibility.

Q. The last question just asks basically whether or not it was an offense that involves some provocation. In other words, did the victim do or say something to provoke the Defendant into killing him. If you decide that he didn't do anything, then you answer the question yes, it was a unprovoked death. If you decide he did or said something, then you decide whether or not the Defendant acted [1542] reasonably or unreasonably in killing him. Do you see what I'm getting at?

A. Yes.

Q. Let's shift gear for just a second, Mr. Warren, and talk about what we started talking about intially and that's the offense of murder. Let me make sure you understand what murder is and what murder is not, okay?

A. Yes.

Q. Because you mentioned something earlier about self-defense. Let me talk to you about the offense of murder. Let me set the ground work. You could be on a capital murder jury. Just imagine fro it for a second. We're not talking about this case or anything like that, just another case, imaginary case. Let's say it was a murder during a burglary. Let's suppose for just a minute that you hear evidence that satisfies you and convinces you beyond a doubt that the Defendant murdered this individual, but let's say you didn't hear any evidence about a burglary. Do you see? If we want to convict the Defendant of capital murder, we have prove both the murder and [1543] the burglary. Do you see what I'm getting at? We didn't do that, though, did we? We only proved the murder, so you can't find the Defendant guilty of capital murder if we didn't prove the burglary. You found him not quilty of capital murder and found him quilty of murder, which is what we did prove. Am I making myself clear?

A. Are you saying, if you proved the murder and not the burglary, it's not capital murder?

Q. That's exactly what I'm saying. In order for that to happen—lets' say that happened. Then the only thing about automatic life or automatic death—remember, as I said earlier, you can't get the death penalty or an automatic life sentence just for murder. Do you understand that?

A. Yes.

Q. Okay. I gather you feel pretty stongly about murder, do you not? I mean, it goes without saying?

A. Well, It's just like I said, you know. There are cases, I mean, personally, that I feel I wouldn't want to personally be, [1544] you know, involved with it if I had a choice, but as far as the case, you know, if I feel that you can avoid it, you know, I think you should

Q. All right. So let's talk—you said earlier that one of the biggest factors in your decision would be whether or not a person, like you said, had to do it or had another choice; is that correct?

A. Yes.

Q. Okay. Now, when we talk about murder, we talk about a situation where one person knowingly and/or intentionally causes the death of another human being without any legal excuse or any legal justification. Let's talk about what a legal excuse or legal justification is. One of them was mentioned earlier. It's self-defense. You, me, Mr. Nelson and everyone here had the right to kill somebody, if it's necessary, in self-defense. If we do that, even though we might be charged with murder—if you were charged with murder and I was on the jury and I believed that you acted in self-defense, I would have to find you not guilty. It's not that I would give you [1545] a low punishment, but if I understood and believed that you acted in self-defense, I would have to find me not quilty, if things were switched around. Do you see what I'm getting at?

A. Yes.

Q. So when you're thinking about the punishment for murder, the range of punishment for murder under the law—and we'll talk about that in a second—don't be thinking about self-defense because if you think somebody killed in self-defense, then you have to find them not guilty. They're not guilty of murder, so don't be thinking about self-defense.

Another justification would be, or another situation is, if you kill somebody accidentally. Even though you've been charged with murder, if I believe that you killed somebody accidentally, the gun went off by accident, the gun or a knife, whatever the case may be, I would have to find you not guilty. It's not like you say, "Let's give him some light punishment or give him probation or [1546] something like that." It's not guilty because that's no murder. If you believe that I was insane, ever though you might not like the insanity defense because a lot of people don't if you honestly believe that I was insane when I killed somebody, it's not murder. Do you see what I'm getting at?

A. Yes

Q. The same thing holds true, lets say for a crime of passion, something that we all can understand. For example, you're a parent and let's say, God forbed, something should happened to one of or daughters. She's sexually molested, for example. You come home and you find out and you find out that the neighbor up the street is the one who did it and he's laughing about it and you go berserk, you know. You pick up a gun or a knife and you go up the street and you kill him. Do you see? That's not murder, either. If you believe that I did that, for example, because of what reaction I had to what this guy had done to my daughter, that's not murder. That's voluntary manslaughter. Do you see what I'm getting at?

A. Yes.

[1547] Q. It's not murder. If want you to divorce your thinking form accident, insanity, self-defense or a crime of passion or even a reckless act where I shouldn't have been

doing something because murder is a knowing and international act. I knew, when I killed Mr. Nelson, what I was doing and I intended to do it. Do you see what I'm getting at?

A. Yes.

Q. Now, the reason mention that is this: The law—as I said, there is a completely different range of penalties for offense of murder. I don't want you to be think about these other things where you might say that you would give a guy a break if it happened—if I thought he was insane or if I thought it happened in self-defense, any of those cases. You don't do that. You find them not guilty. What we're talking about, we're talking about murder, "I knew it." I intended to do it." "I killed somebody." There is no legal excuse or no legal justification.

Let me ask you: What do you personally feel ought to be the penalty? What do you think ought to be the minimum penalty [1548] for someone who knowingly and intends to kill somebody? What do you personally feel should be the minimum penalty for that sort of conduct?

A. Are you speaking without any provocation or anything, just—

Q. Right.

MR. CUNNINGHAM: Your Honor, we would object to ith out any provocation because provocation is not an element of the offense of murder.

MR. MACALUSO: I'll rephrase it, Your Honor.

THE COURT: Go ahead.

Q. When we say provocation, we mean something where I would be acting in self-defense if he provoked me. I'm talking about limiting it, so don't be thinking about self-defense, insanity, accident or a crime of passion, in the heat of passion. What do you think the minimum ought to be?

A. Well, if I have to just give you a flat answer without knowing the case itself—

Q Well, I cannot give you a fact [1549] situation and I'm not asking you what would you do if this happened and what would you do if this happened, what would you do if that happened. Let me ask you this: The range of penalty for murder is from five years in the Texas Department of Corrections all the way ninety-nine years or life and up to a $10,000.00 fine. The law simple says, to be a qualifed juror, if you can in all honesty, you have it set the punishment somewhere within there. If not, like you said earlier—in all honesty, if you cannon, if you don't think you could set a punishment within that range, then you need to let us know. In other words, if you saw a case that involved a murder—and I don't have time to go back and review those categories, but a murder where one person knows he's going to kill this individual and intends to kill the individual and kills him—what do you feel would ever be proper, under any facts and circumstances, to your way of thinking, to ever assess a penalty as low as five years in the penitentiary for a knowing and intentional killing?

MR. CUNNINGHAM: If he [1550] thought that was the proper punishment.

MR MACALUSE: Excuse me, Judge.

MR. CUNNINGHAM: Your Honor, if he felt that that was a proper punishment in that case.

THE COURT: Did you qualify it like that?

MR. MACALUSO: I believe I did. I think I said what he thought was proper based on the facts.

Q. In other words, could you ever vote for five years?

A. I would try to make my decision based on the case and the evidence at the time.

Q. Are you saying that you could?

A. I could, based on the evidence that was given at the time, yeah.

Q. All right. By the same token, I gather then, if you heard facts and circumstances that called for a sentence of ninety-nine years of life, if you felt that was the proper thing to do after you heard the [1551] evidence, you could do that?

A. Yes, if—I would make my decision after I heard the evidence. I wouldn't make the decision in advance.

Q. Let me ask you this, sir, in closeting here; If you had the choice of having the death penalty in Texas or not having the death penalty in Texas, how would you feel? Would you have one or not have one?

A. Well, you mean just a flat yes or no on the death penalty?

Q. Yes.

A. Well, I probably wouldn't vote yes or no because there are cases where I do believe it probably would be roper, but there area other case where I don't so—

Q. What I'm saying is, if you could tailor certain fact situation, do you feel that we should have the death penalty of certain types of cases?

A. In certain types of case, I do.

Q. Mr. Warren, I've done most of the talking here and given you time to respond, by let me ask you: Do you have any questions of us, at all?

[1552] A. Not at this time.

Q. Do you know of any reason, sire whether I've touched on it or not why you couldn't be a fair and impartial juror to both sides?

A. None whatsoever.

Q. Is there any reason why you couldn't answer all three of those questions yes. If we proved that they should be answered yes, knowing that it would result in this man's execution?

A. No.

Q. I appreciate your honesty, Mr. Warren, with us. Mr. Cunningh am and Mr. West will have some questions for you now.

MR. MACALUSO: I'll pass the witness—Juror, rather.

THE COURT: Thank you Mr. Cunningham.

[1553] EXAMINATION

BY MR. CUNNINGHAM:

Q. Mr. Warren, as you have been advised, my name is Brice Cunningham and, along with Mr. West to my left, we represent Mr. Thomas Joe Miller-El in this case where he stands charged with the offense of capital murder. Very briefly, I would like to ask you some questions concerning the questionnaire and possibly some questions that may have been propounded to you by Mr. Macaluso.

This first question my sound like it is asinine or a question that is obvious on the face, but there are some things that we have to get at indirectly. What is your races?

A. Black.

Q. I notice that you live as 4123 Telstar?

A. Yes.

Q. How long have you lived there, sir?

A. I've been there about eleven years now.

Q. Are you buying your home or renting you home?

[1554] A. Buying.

Q. You work at Kroger's as a market manger?

A. Yes.

Q. How long have you been with the Kroger's stores?

A. About twenty-one years.

Q. How long have you been market manager?

A. About nineteen and a half.

Q. Does your wife work outside of the home?

A. Yes, she does.

Q. In what capactity?

A. She's an operator. She operates a bagging machine.
Q. How long has she been employed?
A. About twenty years.
Q. You're a member of Salam Baptist Church?
A. Yes.
Q. How long have you been a member of Salem Baptist Church?
A. About twenty years.
Q. Your two sons, are they in high [1555] school?
A. One of them is, the youngest.
Q. Where is the oldest?
A. My oldest, he's at home, but he goes to a college here in town and works at night.
Q. Which one?
A. Mountainview.
Q. What year is he in at Mountainview?
A. He's in his second semester.
Q. How long were you in the army?
A. About three months.
Q. You're a member of Local 540 Union, meatcutters' union?
A. Yes, I am
Q. Have you held any offices in that union?
A. No.
Q. Is your brother still on the police force in New Jersey?
A. No, he's not.
Q. How long was he on the police force in New Jersey?
A. I'm not sure. He was up there, [1556] after he got out of the service, for about twelve years. I don't know exactly how long he was on the force.
Q. This mishap that your son was involved in, was that Bengy or Joe, Jr.?
A. That was Joe, Jr.
Q. Did anything happen as a result of that that might affect your decision if chosen as a juror in this case, sir?
A. No.

Q. That was something at school?
A. Yes, it was.
Q. You indicate that sometimes you see certain cases on TV and you're interested in it. You understand that anything you may have seen on TV would have no bearing whatsover on any issues in this case?
A. Yes, I do.
Q. And you could put that out of your mind?
A. Yes, I could.
Q. Was you brother-in-law a victim of a crime in Las Vegas?
A. My brother. Yes.
Q. Okay. What type of crime was it?
[1557] A. I don't know the details of it, sir. He had to make restitution of some money. It involved some food stamps or something, but I don't know all the details of it. He was convicted and got a probated sentence. He had to make restitution of some money.
Q. How long ago was that, sir?
A. That was about a year and a half or two ago.
Q. How long have you been a member of Crime Stoppers?
A. Well, the reason is, we have it in the neighborhood, you know, where we have—Is it called Crime Stoppers or Crime Watchers where, you know, you watch neighbors' homes? That may be Crime Watch, but it's the neighborhood service thing where the neighbors watch each other homes. That's what I'm speaking of. When Chief Dyson was here, we were also involved in the other program that he had that was similar to that. I can't recall the specific name of I, though. It was similar to that. They would have little meetings in the schools and PTAs and stuff like that. It was kind of a neighborhood thing is [1558] what it was.
Q. What part of the city if Telstar located in?
A. It's in Oak Cliff off of Westmoreland.

Q. Do you know of any reason, Mr. Warren, why you could not be a fair and impartial juror if chosen in this case?

A. None whatsoever.

MR. CUNNINGHAM: Pass the juror, Your Honor.

MR. MACALUSO: May we have have just a moment, Your Honor?

THE COURT: Surely. Mr. Warren, let me ask you to wait out in the hall for just a moment, please.

(Whereupon, Mr.Warren left the courtroom, after which the following proceedings were held.)

MR. MACALUSE: We will exercise a preemptory challenge.

THE COURT: Okay. Well, I'll—

[1559] MR. WEST: I didn't hear you. Excuse me, what was that, Judge?

MR. MACALUSO: I said we exercise a preemptory challenge.

THE COURT: Of course, I'll note that.

(Whereupon, Mr. Warren returned to the courtroom and the following proceedings were held.)

THE COURT: Mr. Warren, I'm going to excuse you from service in this case, which means you will be free to leave here and go about your business. I want to add to what I said earlier and thank you for you patience primarily with us and the system. You were down here Monday practically all day and you're down here late this afternoon. I not from some of these lawyers questions that they felt a great deal of respect for [1560] you, because I do, for your answers. You're the kind of juror to me, at least, that makes the whole system work. It's people like yourself who are willing to put up with the hassle of the system to do your duty as a citizen. I wish

you could serve as a juror on some cases, but evidently this not the case, so you will be excused to go about your business. Thanks a whole lot.

MR. MACALUSO: Thank you Mr. Warren.

MR. CUNNINGHAM: Thank you.

THE COURT: That take care of twenty-eight.

MR. MACALUSO: Twenty-nine.

MR. NELSON: Thirty.

MR. MACALUSO: Thirty-one and thirty-two.

(Whereupon, these proceedings are continued in Volume IV.)

* * * *

[1564] NOAD O. VICKERY,

called as a jury panel member, having been duly sworn by the court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q. Good morning, sir. I would like to start out by reintroducing everybody since it's been a couple of days. My name is Jim Nelson. Sitting next to me is Mr. Paul Macaluso. A third gentleman will be involved in this trial when we start the evidence. His name is Norman Kinne. Mr. Kinne is about fifty years old and is home with the chicken pox this week and will probably b there for a little while, I would imagine. I I didn't like it much hen I was seven years old and had them and I don't think I would like it now any more.

The three of us are assistant district attorneys here in Dallas and we've been assigned by your elected district attorney, Henry Wade, to handle this case for the State of Texas.

Seated immediately to my left is

* * * *

[1567] to go into some detail. I hope you will bear with me on that. Then I'm going to have to ask you some rather pointed questions for time to time. It's not because I'm nosy or I'm naturally curious. It will be some things that we need to know so that we can get the twelve people best suited to serve on this jury sitting in those chairs over there.

What that somewhat lengthy introduction, if you will bear with me, that's where we're headed in the next few minutes. I feel like it is only fair, Mr. Vickery, to tell you our position going into this case. We, Mr. Macaluso, Mr. Kinne and myself, represent the people of Dallas County and are actively seeking the death penalty for Thomas Joe Miller-El. We feel like we will be able to present to the persons on this jury sufficient type and quantity of evidence to convince them, number one, to convict Mr. Miller-El of capital murder and then in the second phase of the trial to convince you to answer those three questions yes. If those three questions are answered yes, the result is the death penalty. We'll talk more about that in a few minutes, [1568] but I feel like it is only fair for you to know going in what our position is. That's where we are and we're going to continue to seek the death penalty through out the trial with the expectation that we will be able to present to you that evidence and that man sitting right down there will be executed at some point as a result,

You had a chance on Monday, without having much time to give it thought, to fill out a questionnaire. One of the questions on that questionnaire was related to the death penalty. I know this was kind of sprung on you. Most people come down here expecting to be on a civil case or shoplifting or something and you walk in here and get a capital murder, it's a little bit different.

Now that you have had a couple of nights to sleep on it and a couple of days to think about it, would you tell us in your own wor(s your feel ings on the death penalty, whetner you feel it is proper or not, whether you feel like you could sit as a juror in this type of case?

A Well, sir, I've thought about it

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[1590] happened and the facts of the case, if we failed to prove one of those beyond a reasonable doubt, could you answer it no even knowing that it would result in a life sentence and not the death penalty?

A Yes,

Q So you would bane your verdict on the evidence?

A That's correct.

Q That's all we ask you to do. Wow, there was one thing that we don't anticipate will happen in this case, hut it might so we need to cover it with you. Do you remember that I told you earlier that capital murder in this case was murder plus another offense, If we fail to prove that second offense—if all we prove is that this Defendant knowingly or intentionally caused the death of another individual, but we don't prove it was in the course of committing robbery; then we haven't proved capital murder, we've just proved murder I think you remember that I said a few moments ago; the range of punishment for that is from five years up to ninety—nine years or life and a fine of up to $10,000.00. The death [1591] penalty is not an option in that case. Am I clear on that so far?

A Yes, sir.

Q If you are to be qualified to serve as a juror on this cane, you nave to be able to tell us that you can consider the entire range of punishment for the offense of murder if be is found guilty of simple murder, the killing of another individual without any legal justification or excuse whatsoever, no self—defense, no accident, no killing in the heat of passion or anything like that, knowingly or intentionally

killing another human being, Mr. Vickery, I'm just going to ask you, if, after hearing all the facts and circumstances, all of the evidence; you convicted a person of murder, if you feel that the facts and circumstances justified a sentence of Ninety-nine years or life, could you give that sentence?

A Yes, I could,

Q The other end of it is this: If, after you convicted a person of knowingly and intentionally killing another human being without any legal justification or excuse—[1592] would you agree with me that there are a number of circumstances that could enter into a killing? It might not be legal justification, but a number of surrounding facts and circumstances?

A I agree.

Q They could all have an effect on something like that. If, after hearing all the facts and circumstances of the case, you convicted the person of murder, if you felt like, based on the evidence, in your own mind, those facts and circumstances justified a five year sentence for the offense of murder, could you consider that and give that?

A Yes, I could.

Q So you're telling us you could consider the entire range of punishment for the offense of murder, the knowingly and intentionally killing of another human being; is that right?

A I feel like I could, yes.

Q. Obviously we can't tell you the facts of the case. We can't even give you any examples of what some facts might he. All you have to be able to tell us is, if you hear the [1593] case that justifies life, you will give life. If you hear the case that calls for five years in your mind, you will give five years and you will keep an open mind until you've heard all the evidence, I think you're telling us that you can do that; is that right?

A I certainly feel. that I can, yes.

Q Okay. Mr. Vickery, that's all that we ask. There is one other thing and that is, there may be certain circumstances in cases in Texas where there is only one eyewitness to a crime. For example, if you have a purse snatching or a rape, it could he the only two people there are the person that committed the crime and the victim of the crime, the person who was raped, The law allows the State of Texas to prove a case with only one eyewitness. If you believed that witness beyond a reasonable doubt as to every element of the offense; the law says that's enough and you're required to convict that person based on the testimony of one eyewitness. If you don't believe a person beyond a reasonable doubt as to anything in that indictment, you're required by the law to find him not guilty as in any

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[1601] your sister?

A That's correct.

Q "Info not know." What did you mean by that?

A It happened when she was—I was a teenager and she lived in Chicago and she was assaulted and put in the hospital. I know she came home—I was still living at home and she came home and stayed several months to recuperate. I don't know the details of that, T just know that she was assaulted.

Q That wouldn't affect your deliberations in this particular case, would it, or your ability to serve as a juror?

A I don't think so, no, sir.

Q You're saying no, it won't?

A No, it would not affect me,

Q Okay. You indicated also that your sister had been charged with, arrested, indicted and convicted of a criminal offense?

A That's correct,

Q What was that about and when was it? it?

A Again, I do not know the details. I know she was a arrested and served time in the [1602] penitentiary. It was in California. Again, I was a teenager and I do not know the details.

Q Because you were a teenager at the time?

A Yes,

Q Would that affect your ability to serve as a juror in this case?

A I don't think so, no,

Q You keep on saying "I don't think so". When you say I don't think so, you're saying that's no?

A No, it would not. I'm sorry.

Q You served on a criminal jury here in flallaq in 1976?

A I think it was '76, 7 didn't write it down, but it was about ten years ago.

Q Do you recall what type of case it was?

A It was a theft case.

Q How many people were on the jury?

A Twelve.

Q Were you able to reach a decision?

A Yes, we were.

Q And the jury accessed the punishment?

* * * *

GENE R. HINSON,

[1640] called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NACALUSO:

Q Can you hear me all right?

A Yes.

Q I tend to let my voice drop and I can get rambling pretty fast, so if I do, slow ire down, all right?

A Yes.

Q Mr. Munson, let me begin by reintroducing every one here. My name is Paul Macaluso, This is Jim Nelson.

MR. NELSON: Good afternoon.

Q Another lawyer will be jointing us once the trial begins. His name is Norman Kinne, Mr. Kinne has the chicken pox. He's about fifty years old, too, so we've been ribbing him, you know, as kind of a late hlooi'er. We're the lawyers for the State and we're all assistant criminal district attorneys, as I'm sure you may recall from the

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[1645] not be suited because of their personal feelings about the death penalty. Do you see what I'm getting at?

A I understand.

Q That's why we have to go through this laborious and tedious and somewhat repetitious process to get to know somebody and know more about then and see if they're really suited for this type of case. In the final analysis, Mr. Hinson—well, let me just put it this way at the very outset so you will know exactly where the State stands with regard to the reality of this particular case and this particular Defendant,

We are actively seeking the death penalty in this case for Thomas Joe Miller—El, the man seated right over there. In other words, we know that the law does allow for the death penalty, legal execution. We intend to be able to provide a jury, once it is selected, with the type and the qualify of evidence that would convince them beyond any reasonable doubt, as the law requires, that Mr. Miller-El is guilty of the offense of capital murder just exactly as he is charged in this indictment.

[1646] Then in the second part of the -trial, we intend to be able to provide a jury, once it is selected, with the type and

the qualify of evidence that would convince them beyond any reasonable doubt that all the questions that will be submitted, the two or three questions, should be answered yes which, as you know, will result mandatorially, automatically, without any question or reservation, in the Judge sentencing Thomas Joe Miller—El to be executed by lethal injection down in Huntsvil]e, Texas.

The reason I go through that is, of course, to tell you in all fairness, as we've done every one else that we've talked to, exactly where we stand based on the evidence. Of course, ultimately it is up to the jury to decide based on the evidence and the law. We feel it is only fair to every one on notice as to where we stand.

Of course—as y'n well know, you're thirty—nine years old, You've been around long enough to know that there was a tine in this country when people were being assessed death sentences, but no one was being [1647] executed and there was perhaps a time when any juror could probably, in their minds, think, well, it's just not a real thing. We might sentence someone to die, but they haven't executed any one in ten, fifteen or twenty years in some states. That's not the way it is any longer. I think any one—in all fairness to them and the realization—should realize and expect that if the death sentence were returned in this case, Mr. Miller-El will be executed at some point in time under the law. As you know, that's by lethal injection here in Texas.

Now, with those remarks out of the way, let me just ask you—I know you were asked this question—and then we're going to let you talk a little bit. Like I said, they've heard enough of me. Question fifty-six asks you do you believe in the death penalty and you had precious little time to really think about it, I suppose, and express yourself: but you've had two or three days to sleep in it, I guess; and think about it and mull it over in your mind. Let me ask you to share with us in

your own words your feelings [1648] about the death penalty and your ability or your inability, because of your personal feelings, to actually serve on this type of a jury?

A Well; I believe I put on the form there that I didn't agree with it for both moral and religious reasons, Not that I've done any tedious investigation, but from what

I've—just from the media and what I've read on my own—

THE COURT: Excuse me just a minute.

(Whereupon, an off therecord discussion was held,)

THE COURT: That was Mr. Weaver, I wanted to explain to him what had happened. I'm sorry, Mr. Hinson, That was right in the middle of your explanation. Go ahead.

A Well; I was just explaining from a lot of the data that I've read and so forth, it hasn't proved to be that much of a deterrent anyway. Then not only because of that; but just my own personal beliefs in the matter.

* * * *

[1787] what he wanted to do at the time that he had the right to shuffle and he did that, Then I turned around and did it according to how the defense wanted it done, Now, Mr. Nelson and I talked about it and he had made some mention down in the jury room that I was intentionally doing something and then he backed up off of that. Now, he is bringing it in under the guise as though just because sixteen jurors and one position on the first shuffle are in the same position on the third shuffle that it wasn't done randomly or the shuttle wasn't done correctly.

Mr. CUNNINGHAM: Your Honor, the point is, what this is really all about is that jurors number one, two: three, four and eight and fifteen on the first list were all black, that when they went down and shuffled the first tine; the black jurors

were number [1788] nineteen, twenty-six, thirty-six; thirty-seven, thirty-eight and thirty-nine; that after the second shuffle those same six blacks are now one, two, three, four, seven and fourteen. That's what this is all about.

MR. NELSON: Judge, I'm going to object to bir. Cunningham telling the Court what this is all about. I voice the State's objections—the Court can tell from the procedure, and I would like the record to reflect, that I voiced my objection to this last array before I knew what it was. I voiced my objection to the shuffling down in the central jury room while it was going on and before I knew what order the jurors would come up here in.

MR. WEST: Judge; Mr. Nelson was standing right by me when I shuffled, Now, he cannot dictate the number of times that the

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[1796] EDWIN L. RAND;

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q. Mr. Rand, I'm sorry. We're having a little trouble getting organized this afternoon it seems to get going. I'm sorry to make you sit up there for a minute. I want to kind of reintroduce everybody. You heard us in front of the whole group earlier this morning. To begin; my name is Jin Nelson, Fitting next to me is Mr. Paul Macaluso. The third person that will be involved for the State of Texas is a gentleman by the name of Norman Kinne. Mr. Kinne is about fifty years old and is home with the Chicken Pox and has been for a couple of weeks. Raving had then as a child, I can sympathize with

him, I certainly wouldn't want to have then at fifty years old, but that's what he's dealing with. The three of us are assistant district attorneys and it will he our responsibility to [1797] handle this case for the State of Texas. We've been assigned to handle it by Henry Wade, your elected district attorney. Immediately to my left is Mr. B. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Rand?

Q And to his left is Mr. Royce West.

MR. WEST: Mr. Rand; good afternoon.

Q These two gentlemen have been appointed by Judge McDowell to defend Thomas Joe Miller-El. He's the man at the far end of the counsel table from me. You may be able to see him or you may not from your position there, Mr. Filler-El is charged with the offense of capital murder, That is the most serious offense in the State of Texas. Because of that—have you been on jury service before, Mr. Rand?

A No, I haven't.

Q Normally in jury service, you would be seated out in the gallery with the entire group: kind of like you were this morning; and question would be asked and some things would be discussed out there in front of [1798] the entire group rather than one on one or one on five like we're doing it here, The hope in, that because these issues are so serious and people have very strong feelings one way or the other on what's involved in this case, by you being in here individually, you will be able to feel that you can talk more openly and hopefully be a little bit more relaxed; at least as relaxed as you can be while you're up on the witness stand and we're out here, The big thing that we would like you to do is relax and remember, Mr. Rand; that there are no right or wrong answers to anything any of us are going to ask you today. We're just trying to find out how you feel. No one is going to argue with you or try to change your mind about anything, but we feel like you need to know what you're

dealing with and what's going to happen and, of course, we need to know how you feel about some things, so we can get the twelve people best suited to serve on this jury sitting in those twelve chairs over there.

Now, we've talked to—you're the thirty-seventh person we've talked to in this trial and we have two jurors at thin point, so [1799] you can see it's a rather tedious process and things take a while. Not everyone is suited to serve on this particular kind of case. With that rather lengthy introduction, that's why we're talking to you individually and, if you will just he as open and honest as you can be with all of us, Mr. Cunningham, Mr. West and the Judge, who will be listening at the sane time I'm talking to you, if you will be as candid as you can be; then that will help us do what we need to do and find out whether you're the kind of person suited to serve on this kind of jury or not, okay?

A Okay,

Q Now, Mr. Rand, I feel like you have a right to know what our position is right now, Our position doesn't really count and yours does, but I want you to know where we're coring from. The State of Texas is actively seeking the death penalty for Thomas Joe Miller-El, that man sitting right down there, We feel like we could present to twelve jurors the type and the quantity of evidence that will convince then to find him guilty of capital murder and the type and quantity of evidence [1800] that will convince the jury beyond a reasonable doubt to answer those three questions yes that result in the death penalty. Judge McDowell has no options. If those three questions are answered yes by the jury, he must assess the death penalty, period, no ifs, ands, or buts about it, If one of those questions is answered no, he must assess a life sentence, Again, he has no options, so its up to the jury what's going to happen in this case.

Now, with that—I know you had a chance this morning to fill out a questionnaire, but you didn't have a whole lot of

time and we were shuffling in and out of the courtroom while you were trying to do it maybe over lunch you bad a little bit wore time to think about it, but would you tell us just briefly how you feel about the death penalty?

A That's kind of a touchy subject. In my own opinion, I think it could be enforced depending upon the crime itself: the circumstances of why someone was killed or could it have been avoided, that type of situation.

Q Okay. Have you given it any [1801] thought before today, Mr. Rand?

A No, not serious thought.

Q I understand that you haven't had a whole lot of time to think about it today, since you just found out three or so hours ago what the situation was?

A I think I've always pretty much had that sane attitude toward it, though.

Q That was going to be my next question, how long you have felt the way that you do now. You're not married; are you, Mr. Rand?

A No, sir;

Q Did you grow up here in Dallas?

A. Yes, I did.

Q Pre your parents here?

A Yes.

Q Would you venture a guess as to how your parents might feel about the death penalty?

A I couldn't because we haven't talked about it.

Q You-all haven't discussed it at all?

A. No.

[1802] Q. Okay. Do you have any brothers and sisters?

A Yes, one of each.

Q What about them, do you have any idea how they feel about the death penalty?

A No.

Q Okay. Well, you say you've felt this way for a period of time. Let me just tell you briefly, the death penalty in Texas only applies to, what we call, capital murder and that is murder in a specific situation or a specific set of circumstances; one, the killing of a police officer or a fireman when they're on duty or the killing of a prison guard. That's capital murder, Another type, as I think the Judge mentioned this morning, is a mass murder like we had at a bar a year or two ago. The third kind is what we're dealing with here, As the Judge mentioned, it's what we call murder plus. It's murder in the course of committing another offense. In our case, it's the offense of robbery.

Basically, what we've alleged in the indictment; Mr. Band, in that this defendant, Thomas Joe Miller-El, did knowingly [1803] or intentionally cause the death of another individual and that's murder, plain murder, but we've gone on further and said that he caused the death of that individual while in the course of committing or attempting to commit the offense of robbery. Now, we've got murder in the course of committing robbery. Is that the kind of thing that falls within your idea of a crime for which the death penalty should he considered?

A Yes, because of the murder knowingly. It wasn't a case of; say, self— defense or an accidental type thing.

Q Okay. Let me just touch on that for a minute, since you brought it up. We talked about murder in the State of Texas. We're excluding things like self-defense or accident or insanity. If something was done in self-defense and the jury finds that it was done in self-defense, then that person is not guilty of tire offense of murder, By the same token, if it's an accident, they didn't knowingly or intentionally cause the death of someone; hut it was an accident, then it's not murder. It's a not guilty or maybe an [1804] involuntary

manslaughter or something like that, but it's not murder. If a person is found to be insane, they're not guilty if they were insane at the time they committed the offense,

Basically what you're telling me is, you could consider the death penalty for this type of case; is that right?

A Yes? sir.

Q Now, Mr. Rand, I don't like to pidgeonhole people and T don't really like to put people into categories: but I guess it kind of serves a purpose for me in this situation, guess there are about four categories of people who come in and talk with us on cases like this. The first category is the person who comes in and believes in the death penalty, believes strongly in the death penalty, and says "I can sit on a jury and I can listen to the facts and I can assess the death penalty if it is warranted. I can handle that." The second group would be a person who believes in the death penalty. There's no question about that, but for morel or philosophical or religious reasons; whatever, [1805] they don't feel like they're the type of person who can sit on the jury and actually be involved in assessing the death penalty. They feel it's right and they feel it serves a purpose, but they don't feel like they could be the ones to actually do it. The third group is a group of people who are against the death penalty, but they don't really feel all that strongly about it. If called upon to serve on a jury and answer some questions, they could do that even knowing it would result in the death penalty. Although they don't really believe in it, they just don't feel that strongly one way or the other. The fourth group is a group that doesn't believe in the death penalty and will not he involved in assessing the death penalty under any circumstances whatsoever, Can you give me an idea of where you fit in those groups?

Probably in between the first two, sitting in the jury and being able to say, "Okay, he's guilty." and being able to do that. But again, somewhere along the line, T would probably

think to myself, you know, "Can I do this?" you know, right now I say I can, [1806] but tomorrow I might not.

Q. Okay. Well, let ne just kind of—you know, lawyers, when we're picking juries and talking about things, we kind of talk in the abstract, We talk about, well, could you do this in a case, could you give the death penalty in some case, somewhere, you know, but now, as you've realized, I guess, from this morning, this is real, We're here now and we're talking about that man sitting right there, In this case, if the evidence is presented the way we anticipate it will be presented, we will ask you, number one, to find him guilty of capital murder, We will ask you to find that the answers to those three questions are yes, a yes answer to each of those three, Now, what that means is, that man right down there, Thomas Joe Miller—El will be, at some point, taken to Huntsville, Texas and he'll be placed on death row and, at some point, he will be taken to what's called the death house in Huntsville, Texas and he will be strapped onto a gurney and an TV will be inserted into his arm and, as he lays there, a substance, lethal substance, will be injected [1807] into him until he is dead and that will be as the result of the verdict that twelve jurors rendered in this particular case. Now, I don't say those things to scare you or to make things seem horrible, but I feel—it's just like applying for a job, Mr. Rand; we feel like you need to know what you're getting into because once you have a seat over there: it's too late to say, "Hey, wait a minute. I just can't do something like that," Although we can't go into the facts of the case and we can't go into any of the circumstances surrounding the case, I want to tell you as much as I can about what you're going to be dealing with so you can tell me now whether you can serve or not serve on this kind of case, Let me assure you of one thing. I told you that we have talked to thirty-seven people or thirty-six before you and we have two jurors. It's no great sin or it's not bad citizenship or something like that if you can't serve on this jury, It's a big decision and it's—

Mr. CUNNINGHAM: Your Honor, we're going to object to counsel for the State inferring that this [1808] panelist cannot serve on this jury. Everything that he has said so far indicates that he is qualified both by the law and by the questions that Mr. Nelson has asked him.

THE COURT: Overruled, Go ahead.

Q I don't mean to infer anything one way or the other, Mr. Rand, but you made the comment that you don't know what you're going to feel like tomorrow when it really comes down to it and that's why I'm asking you. Nobody is going to force you to do something that's going to violate your conscience or bother you so much that it's going to affect your deliberations or going to affect you deeply and emotionally for the rest of your life. No one is going to ask you to do that, I go hack to my job analogy. The Judge told you about the oath that you would have to take if you're going to serve on this case, I wilt a true verdict render according to the law and the evidence. Some judges put so help me God on it and some don't; but that's the oath, You don't [1809] have to take that oath. If it's going to bother your conscience or you just don't feel that you can, in good conscience; do something like that, no body is going to ask you to do that. Again, I've rambled on and rambled on about things and I'm not giving you much time to talk or think, either one, but I don't mean to do that. It's difficult not sitting over there right now; I know that, but we need to ask you what—do you feel like you could serve on this kind of jury and answer those questions yes, if the evidence calls for it, knowing that, without question, without option, that results in Judge McDowell assessing the death penalty for that man sitting right down there? Do you feel like you can do that?

A Yes, I do.

MR. WEST: I'm sorry, what was that?

A Yes. I do.

Q Okay. Now; you hesitated a few minutes ago and—

MR. CUNNINGHAM: Your honor, We'll object to that. We didn't hesitate.

[1810] MR. MACALUSO: Excuse me, Judge. There's nothing wrong in making a legal objection, Judge, but—

MR. CUNNINGHAM: Your Honor, we would object to the statement by Mr. Nelson that he hesitated. The prospective juror did not hesitate. The first tine he nodded his head and the second time he said yes and then the third time he said yes.

MR. MACALUSO:That's not a legal objection, Judge.

MR. CUNNINGHAM: Your Honor, I object to him inferring that the prospective juror did something that he did not do.

THE COURT: I think Mr. Rand is taking care of himself pretty well. Overruled. Go ahead.

Q Let me rephrase what I was saying, Mr. Rand, and, if I say anything at anytime that misstates anything you've said or if there's anything you don't agree with, I hope [1811] you'll tell me. I think you will. You've been talking and you're strong enough to tell me if I say something wrong or something you don't agree with, I want you to, but I remember you saying a few minutes ago that, well, you feel like you could today, but you aren't sure of how you'll feel tomorrow, That's what I was coming back to, have you given it enough thought now that you feel like you're pretty certain you could do something like that?

A Yes, I do.

Q Okay. So if we seat you over there and we prove beyond a reasonable doubt that this Defendant down here knowingly or intentionally caused the death of another individual without any legal justification or excuse and he did

it while in the course of committing or attempting to commit robbery, you will find him guilty of that, if we prove it to you?

A Yes.

Q Okay. Now, the burden of proof stays here. It's always here and we have to prove beyond a reasonable doubt and you'll make us do that, I take it?

[1812] A Yes, I would,

Q Okay. And you're telling us, that further, if after you've heard all the evidence, the answer to each of those three questions is yes, you can answer those questions yes knowing that the result would be that that man would be executed right down there?

A Yes, I could.

Q You're telling me you can do that?

A Yes,

Q Now, Mr. Rand, under the old system, up until about thirteen years ago, the jury, on a capital murder case; actually went out on the punishment deliberations and put on the verdict form life or death, There was no answering questions. Thirteen years ago the legislature implemented this procedure, using these questions and saying that the jury has to answer questions rather than saying life or death, even though, you understand, the effect is the same. We're getting to the same place, but we're just using a little different road to get to it,

Now, I guess that's put in there [1813] as kind of a buffer and that brings me to my next question. If, after you've listened to all the evidence and heard all the evidence, if you're so mad, so enraged by what you heard that you thought this guy has to have the death penalty, period, he just must have it based on the facts, that's the way you feel, but we present evidence and we don't prove the the answer to question number two is yes; in spite of your feelings and in spite of you thinking you're so mad that he's got to have it,

that's all that is good for him, could you still answer that question no realizing that it would result in a life sentence rather than a death sentence?

A If it wasn't proven to me.

Q. Okay. The other side is, if we proved to you that each of those questions should be answered yes, beyond a reasonable doubt we proved that to you, even though you feel that be should get a life sentence, can you answer those questions yes knowing that results in bin being executed, even though you personally feel he should get a life sentence?

A Yes,

[1814] Q Any problem with that at all?

A. No.

Q Okay. Now, Mr. Rand; we talked a little bit about murder a few moments ago and you mentioned that you could consider the death penalty if there was no self—defense and no accident and that kind of thing. Let me touch on that again. If we proved to you—and we aren't saying this going to happen in this particular case, but it might. Under this indictment; we have to prove to you murder in the course of committing or attempting to commit robbery. If we present evidence to you and all we prove is murder; he knowingly or intentionally caused the death of another individual and we don't prove anything about robbery at all then; would you agree with me, all we have then is just straight murder, not capital murder—

A Yes.

Q —because we don't have the extra crime? Okay. Now; when we talk about murder; we're saying knowingly or intentionally caused the death of another individual, We aren't talking about self—defense where people were in [1815] a fight and one guy pulled a knife and the Defendant shot him or something like that. We aren't talking about accidents where it wasn't knowingly or intentionally. It was an accident, We aren't talking about insanity where the law

says the man was insane, We're talking about the person knew he was going to kill; intended to kill and killed without any legal justification or excuse whatsoever. Okay, Even if it was a killing in the heat of passion where someone is just so enraged about something that had happened to a member of his family or something that they went and shot the guy that did it: that's not murder; that's voluntary manslaughter, It's not murder. What we're talking about is knowing or intentionally causing the death of another individual, not in the heat of passion or without any legal justification or excuse whatsoever. Okay. Are you with me on that?

A Yes.

Q Okay. What do you feel should be the minimum possible punishment for the knowing and intentional taking of another human being's life without any legal justification or excuse?

[1816] A I think I could still go with the death penalty on that.

Q You would still go with the death penalty on that. Okay, So you feel; if one person takes another person's life, that kind of—I guess the phrase I've heard used from time to time is an eye for an eye kind of situation, is that right, one person takes another person's life, he should forfeit his life?

A Yes,

Q Okay. Would you ever; ever consider a punishment as low as fifteen or twenty years?

Mr. CUNNINGHAM: Your Honor, we would object to the form of the question in that the law says—the law sets out what the range of punishment is, I think it is being totally unfair to this prospective juror to try to commit him to a particular number of years without telling 11m what the range of punishment is and also telling bin what the law says his [1817] duty would be.

MR. NELSON: I'm not trying to commit him, Judge, I'm just asking what he can consider, what he can think about, what his feelings are..

THE COURT: I'll overrule the objection, Mr. Cunningham. I'm going to give the lawyers, as you now, a lot of leeway here during voir dire to approach subjects the way they want to as long as they get to the right point eventually. I think we'll see that; so I'll overrule the objection.

Q After all that, Mr. Rand, we're back to my question. Do you feel like for the knowing and intentional taking of another human being's life without any legal justification or excuse could you even consider a sentence as low as fifteen or twenty years?

MR. CUNNINGHAM: Your Honor, we'll object to that question in that it is improper because he [1818] left out if it is proved beyond a reasonable doubt in the proper facts and circumstances of that case

THE COURT: Reask the question, Mr. Nelson,

Q Mr. Rand, maybe I didn't make myself clear. I thought I did. Obviously, if we don't prove the case beyond a reasonable doubt, you're going to find somebody not guilty: right, because that's our burden of proof?

A Right.

Q But assuming that we prove that the person knowingly or intentionally, not accident; not self—defense, knowingly or intentionally kills another human being without any legal justification or excuse whatsoever, then could you ever consider a sentence of fifteen or twenty years; down in that range?

A If that's the maximum penalty, yes.

Q If that's the maximum penalty?

A Yes.

Q Okay. Mr. Rand, the law in the [1819] State of Texas says that the maximum penalty for the offense of murder, not

capital murder; but simple murder, is ninety—nine years or life and a fine of up to S10,000.00. That's the maximum. I take it you wouldn't have any trouble considering the maximum, if that were the maximum; is that right?

A Right.

Q If you had your personal way, you would want to consider the death penalty in that situation?

A Weil, if it was proven that it was a capital murder.

Q Okay. That's all we ask, Obviously, you can't give the death penalty far a regular murder case?

A No.

Q The minimum under the laws of the State of Texas is five years for the offense of murder. Now, could you, again, for the knowing or intentional taking of another human life, under the p proper facts and circumstances: give a sentence of five years for knowingly and intentionally taking another human life?

Mr. WEST: Your Honor, [1820] again? improper question, improper as to the form. If he felt as though the case—I'd ask that this be added: If he felt as though the facts and circumstances warranted an assessment of five years. He's trying to get him to commit to five years without telling him if he actually felt it warranted a five year penalty. I would object to the form of the question.

THE COURT: Mr. Rand, the question is, in a proper case; if the facts and circumstances warranted it, where you had found someone guilty of the offense of murder and you thought that a five year sentence under those facts and circumstances was proper, could you assess it?

MR. RAND: Yes, if that's the sentence that could be given

THE COURT: Go ahead, Mr. Nelson,

[1821] Q Mr. Rand, you, as a juror, would decide what sentence is going to he given. Okay. You wouldn't be required to give five years. You aren't required, as a juror on

a murder case; to give five years. You can give anywhere up to life or ninety-nine years: T thought I heard you saying—and I was having a little trouble hearing because you were talking to the Judge—that you could do that if that was what the law required or if that was what you had to do?

A Yes. If that what was put upon me, to say, "Okay, he's guilty and we're going to give him five years," would I go along with that, yes.

Q. Okay. Somebody is not going to tell you that you have to give five years. That's your decision. If you can't consider and assess five years, under the proper facts and circumstances; then that's fine. Nobody is going to argue with you, hut we're just trying to find out because; again; we're going to have to have twelve people who we feel are suited to serve on this particular kind of case. That's is part of that; so I Guess I'll ask the question [1822] again. Could you give five years in a proper case where the facts and circumstances justified it or would you, from what you've told me, want to give more than that?

A I want to give more.

O Okay, Are you telling me, if the facts and circumstances—well, whatever the facts and circumstances, you could not give a five year sentence for the offense of murder, knowingly or intentionally taking another human being's life?

MR. CUNNINGHAM: Your Honor, we'll object to the form of the question because, again, it leaves out the—what the law says, if he felt under the facts and circumstances of that case it warranted five years, could he give five years

THE COURT: Reask the question, Mr. Nelson.

Q You said earlier, Mr. Rand, that you even thought a person like that should get death- If you were setting the laws; you would allow death to be considered; is that right?

[1823] A Yes, I would have to consider it.

Q Okay. But is there any way that you could consider five years for knowingly and intentionally taking another person's life?

MR. WEST: Your Honor, again, I would object and my objection is that it is at improper question. Improper question in that the question should he, under the proper facts and circumstances in Mr. Rand's mind, if he thought the facts and circumstances warranted it, could he consider and also give five years for murder as Mr. Nelson has described it?

THE COURT: Do you understand the question, Mr. Rand?

MR.. RAND: I think so, What he's saying, warranted, does he mean, okay, this is what is going to be given or exactly what is it?

THE COURT: Well, I think you've answered the question properly, Mr. Nelson; go ahead, [1824] Re-ask the question.

Q Mr. Rand. again, when we talked about—when you've heard me use the word warranted, no one is going to dictate to you, as a juror, what the sentence must be. Nobody is going to dictate to you that it must be five years, any more than anyone is going to dictate to you that it must be twenty years or it must be forty-five years or anything else, If you're a juror on a murder case, you're the one who is going to make that decision yourself. What we're asking you, basically, is—you've already found somebody guilty of knowingly or intentionally taking another human life without any legal justification or excuse, Are you with me to that point?

A Yes.

Q Okay. Once you've found them guilty of that, could you ever, under the proper facts and circumstances, vote for a sentence of five years in the Texas Department of Corrections for that offense?

MR. CUNNINGHAM: Your Honor, we will object to the form of the question because it eliminates that [1825] part

that the law says it should have and that is, if he felt that the facts and circumstances of that case called for five years, could he consider it and do it,

THE COURT: Go ahead ask the question.

Q Mr. Rand. let me just put it as simply as I can put it. Would you ever feel five years was justified under any facts and circumstances for the offense of murder?

A No.

THE COURT: What was your answer, sir?

MR. RAND: No.

Q You've told us, I think, that you feel death should be proper. If you were setting the law or you were making the laws yourself, you would feel that death should be a proper consideration under those circumstances?

Q Yes, it should be considered.

Q Okay. Now, Mr. Rand, I remember an old show years ago called Queen for a Day. If you were governor for a day and you could set the minimum punishment in the State of [1826] Texas for the offense of murder as I've set it out, knowingly or intentionally causing the death of another individual, what would you set?

A Probably the maximum that you gave me, ninety-nine or life.

O Okay. You would set that as the minimum?

A Yes.

Q Okay. And there's no way you could ever consider and give five years for that offense; is that right?

MR. CUNNINGHAM: Your Honor, again, we object to the form of the questions It's an improper question the way he asked it of this prospective juror.

Q Under any facts and circumstances, as long as it's a murder the way I've laid it

MR, CUNNINGHAM: Your Honor, we will object to the form of the question. It's an improper question.

THE COURT: Ask the question [1827] again or I'm going to take it over,

Q Mr. Rand, am I confusing you?

A No.

Q You think you understand what I'm asking?

A Yes.

Q Okay. I certainly don't mean to confuse you and, if I didn't tell you at first, I'll tell you now, If I am or if you have a question, ask it, because I want you to be clear on what we're talking about.

A Okay.

Q I thought I understood you to say, if you could set the minimum, you would set the minimum at life or ninety-nine years and you would have death be a consideration?

A Yes.

Q Now, I thought you told me that, under no facts and circumstances, ever, would you consider a sentence of five years; is that right?

A Right.

Q Okay. Mr. Rand, I told you up front that I'm not going to argue with you and [1828] I'm not I would guess, from what you've told me—and you've been pretty definite about it—even if I sat here and talked to you for two weeks, I wouldn't change your mind on it, would I?

A No.

Q And that's the way you feel about it and that's the way you're going to feel about it; is that right?

A Fight.

Q Okay. I don't have any problem with that and nobody is going to argue with you or try to change your mind at all, I guess nobody could, if they wanted to; is that right?

A Right.

Q Okay. Mr. Rand, no one has a right to argue with you about that and no one should argue with you about that because that's your opinion find that's why we have you up here.. is to find out how you feel about things, so I'm sure nobody else is going to argue with you about it, either. I'm about of time and I've thrown a lot of stuff at you. You've been very open and honest with we and I appreciate that, no you have any questions for me? Is [1829] there anything else we need to touch on here that I haven't touched on?

A No. I think everything is pretty clear right now as far as what you've asked me, I think I've understood everything.

Q Okay. I don't think I have any other questions for you; Mr. Rand; if you don't have any for me, There's no way, even if I kept discussing it with you, I could change your mind, so I'm not going to bother you any more. I appreciate very much your tin.e and your patience with me and the openness of your answers. These lawyers will probably want to talk to you a little bit, Thank you very much.

MR. NELSON: Your Honor, we'll submit the juror.

THE COURT: I'll add a couple of minutes onto your time to cover that submission, if you want to.

MR. WEST: If it please the Court.

THE COURT: Go ahead.

[1830] EXAMINATION

BY MR. WEST

Q Mr. Band, ray name is Royce West. How are you doing this afternoon, again?

A Okay.

Q Okay. First of all, let me assure you that no one is arguing with you. Did you feel as though Mr. Nelson was arguing with you about anything?

A No, not really.

Q Okay. I'm not going to argue with you about

anything, either, okay?

A All right.

Q Now, it's okay to feel the way you feel about certain matters. There's no problem with that at all, It's okay to feel about different, controversial subjects the way that you feel. about them. I'm not going to argue with you about that at all, In fact, I would defend your right to say what you want to say no you understand what I'm talking about?

A Yes.

Q Okay. Now, Is this your first time ever to come down for jury duty?

A Yes, it is.

[1831] Q Okay. It's an experience and a half?

A Yes, it is,

Q Okay. Do you consider yourself basically a law and order person?

A Yes,

Q Do you feel as though you follow the law?

A Yes.

Q And that everyone should follow the law?

A Yes.

Q Okay. How much do you know about the judicial system?

A I guess not a lot.

Q You realize that everybody has a right to be tried by their peers?

A Yes,

Q Now, one thing that Mr. Nelson was harping on was your ability to take into consideration, under the proper set of facts and circumstances, and assess the minimum and also the maximum penalty in a murder case.

Q Okay. Now, no one is trying to get you to commit to anything. You realize, as [1832] he indicated, the minimum for murder is five years and the maximum is ninety-nine years; life and an option of a fine of $10,000.00. Our legislature set that range of punishment. The people down in

Austin who make the laws, they set that range of punishment because you can have fifty million different fact circumstances that call fall within that range of punishment: so they wanted to give people that particular range to work with when they're serving on a jury and when they're making a determination as to what the proper sentence should be. Do you understand that?

A Yes.

Q Okay, Now, I'm not asking you to commit one way or the other to saying that you would give somebody five years in the penitentiary. I'm not asking you to do that, but- I'm asking you; if you felt as though you, if you felt as though the proper facts—number one, you found someone guilty of murder, okay—and circumstances existed in your mind, that under those facts and circumstances that you would; number one, consider and; if you felt as though the circumstances and the [1833] facts called for it, assess a penalty of five years. I'm not saying that you have to—again, this is your first time down here. There's fifty million circumstances and you don't have to think of one in your mind, okay?

A Yes.

Q And you know that's what the law is, five years to ninety-nine years or life. I'm asking you, could you consider; under the proper facts and circumstances, assessing a minimum of five years confinement?

A If I had to

Q Okay. If that's what the facts called for?

A Yes.

Q Now; let's explore that a little bit more, You said if you had to, You don't have to do anything.

A Right, Well; when I said that, I was meaning as to what you added onto it, if the facts—

Q if you felt the facts called for it?

A If that's what it called for; yes.

Q I'm kind of misunderstanding you. [1834] You said if that's what it called for. What do you mean?

A Okay. When I said that; I was meaning as of what you tagged onto it, if that's what the facts brought about to it and this was it. Myself and my preference would prefer to have more, but I would consider it.

Q If you felt as though the facts called for it, you could assess it; is that correct?

A Yes, I could,

Q Now; what I want to make sure that you understand, no one is trying to commit to saying "I will give five years." "I'll give life." What we have to know—and there's some confusion as to whether you can consider the full range of punishment, from five years to life, in your mind, if you said these facts called for it, even though a person knowingly and intentionally took the life of someone else without any legal justification such as self—defense or any legal excuse such as insanity; that he knowingly and intentionally took the life of someone, that I can consider the full range of punishment; from five years to life, [1835] and a $10,000.00 optional fine. I can consider it and; under the proper facts and circumstances in my mind; if I felt as though the facts warranted it or justified it; I could give that person five years?

A I would consider it.

Q And you could do it if you felt as though the person should receive five years, is that correct?

A If I felt that,

Q Okay. Understand something now. I'm not saying that you have to give it to a person. I'm saying; if you felt as though the facts and circumstances called for it; that you would give a person five years?

A I would consider it?

Q You said that you would consider it?

A Yes.

Q The law requires—and this is the law—that you not only be able to consider it, but you would be able to do it,

also, if you felt as though the facts called for it. I'm not trying to get you to commit to it. I just want to make sure you have an open [1836] mind to it.

A Well, I think I could; but I wouldn't want to—well, I couldn't then.

Q I'm sorry?

A Well; if we don't have that difference, I would say I couldn't because I couldn't consider—

MR. NELSON: Did he say could not?

THE COURT: I don't know.

MR. RAND: Right.

A Because I could consider it. Now; whether I would like to or not, in my own opinion; I wouldn't want to. Is that what you're asking me?

Q You're saying that you wouldn't want to. I don't have any problems with that, I'm just saying; if you felt as though the facts and circumstances called for it in your wind —— again, this is your first time down here and there's fifty million circumstances that could come up where a person knowingly and intentionally took the life of someone else without any legal justification legal excuse. 7 I'm saying, you Know, would you keep [1837] an open mind and: if you saw those facts and circumstance would you, not only consider it, but also assess the minimum of five years?

A Yes.

Q You can do that? Again, I'm not trying to tie you down to saying you're going to give somebody five years, okay?

A Yes.

Q I'm not trying to tie you down to saying you'll give somebody life, either: but T want you to be able to; if you can; and you said that you could, consider the full range, from five years to life; and; if the facts and circumstances, in your mind; called for it, be able to assess the minimum of five years, which you said that you could, or assess the maximum

of life, which you have to call it like you see it Do you understand what I'm talking about?

A Yes.

Q Can you do that?

A Yes, I could.

Q All right. Now, let me ask you this – Mr. Nelson basically asked you the same question. Was there some communication problem that you didn't understand what he was saying [1838] or what?

A Well, maybe what I was understanding from him was—the way I took it was, what would I do, Okay. Your question was, could I consider or be able to. Yes, I could. Under his consideration; I would want more, but I could consider and give five years if I had to,

Q If you felt it was—

A Well, if that was what was adjustable.

Q I'm sorry?

A If that's what was adjustable under the facts and circumstances.

Q Yeah, that's all I'm saying, You know, you may very well want to—let's get off that for a second- I see that you—what school did you graduate from?

A Skyline.

Q What particular cluster were you in?

A I came out of plastic technology. The first three years I was in automotive.

Q I wash noticing some to the literature that you've read dealt with [1839] automobiles. Again, would this be a fair statement, that people should obey the laws as handed down by our legislature?

A They should.

Q Okay, Would it be a fair statement to say that everyone should, in fact, try to be involved in voting and the jury system and the criminal justice system, also? People should try to be involved in civic affairs is basically what I'm saying.

A If they prefer to.

Q Okay. Now, what are your thoughts about the criminal justice —— have you ever just thought about the condition of the criminal justice system?

A No, I haven't.

Q I'm sorry?

A No, not just serious thought,

Q What are some thoughts that you've had about the criminal justice system?

A Well, possibly say a crime of maybe just robbery and then a separate crime of; say, murder. Why could, maybe, the guy that murdered somebody go to jail for five or six years and that's and maybe a guy that [1840] steals something from a Seven—Eleven has to go for fifteen.

Q So unequal justice?

A Yeah, You know, it sounds kind of funny.

Q What doesn't sound—

A Hee, myself; being on the outside, I'm looking at what is there on the paper in the news. I don't know the facts or anything, really: behind it, but all I see is, okay, this man got fifteen years for robbing a Seven-Eleven and this guy got five for a killing.

Q Do you understand that there are probably a lot of variables that you don't know about?

A Yes, That's what I'm saying. I don't know all of the background to it.

Q Exactly, because there may be one situation where a person gets five years for robbery and a person gets fifteen years for murder?

A Yes.

Q And it's a plea bargain as opposed to a jury trial or a trial before the Court. There are a lot of variables involved; [1841] do you understand?

A Yes.

Q It gets basically back to what I was talking about, There's a wide range of punishment open for various types of

offenses. Did you know that aggravated robbery was a first degree felony offense and that the minimum you could get was five years just like in a murder case?

A I didn't.

Q Okay. Did you know that burglary of a home is a first degree felony just like murder, just like aggravated robbery and the minimum you could get is five years and the maximum you could get is ninety-nine years or life and an option of a fine of $10,000.00.

A No, I didn't.

Q There are numerous other first degree felonies: also- Wow, the only thing that the law requires: in order for you to serve on this jury, is you be able to consider the full range of punishment, that being from five years to ninety-nine to life, and, under the minimum facts and circumstances, in your mind, ff the facts called for it and you [1842] feel as though it's justified, be able to assess the ml n ~ mum of five years and, if the facts called for life, be able to assess life. Can you do that?

A (No response,)

Q Again, this is an individual thing, being able to consider It and; if you believe in your heart that the facts call for it, be able to give five years. I believe you indicated earlier that you could.

A Yes, I could.

Q Can you do that sir?

A Yes, I could.

Q Now, you're telling Mr. Cunningham and myself, as Miller-El's attorneys, that you could consider and assess five years if you believed in your heart that the facts called for it?

A Yes.

Q Now, do you understand what Mr. Nelson and I were talking about concerning the minimum sentence of five years?

A Yes, sir.

Q Do you have a full understanding of it?

[1843] A Yes.

Q And basically the full range of punishment?

A Yes.

Q Mr. Rand, I believe you're qualified to serve on this jury, Thank you, very much.

MR. WEST: I'll pass the juror.

THE COURT: I'll hold that the juror is qualified on your submission, Mr| Nelson. You still have about a minute left on your record of time.

[1844] EXAMINATION

BY MR. NELSON:

Q Mr. Rand, again, the last thing T want to do is argue with you myself, but you realize that you told me one thing and told Mr. West something else and I guess there is some confusion there and I don't want you to be confused. You kept going back to if it was up to you or what you would do. I think words were used: you know, what would I do. I thought you told me that, if you were making the decision, you would want either life or death for this type of offense; is that right?

A Yes, but the way he questioned me, I could consider five.

Q Okay. What we're talking about, if you're on a jury and you're sitting over there on the jury and you hear the facts and it's been proved to you beyond any reasonable doubt that this defendant knowingly or intentionally took the life of another human being, killed them, knew he was going to do it and did it without any legal justification or excuse whatsoever—it's easier to talk in the abstract we're talking about a guy who has [1845] been found guilty of killing another human being and you're sitting on that jury. We're just asking you to be as honest about it as you possibly can be. I know that's what you've been trying to do, but being

just as honest about it as you can with us and with yourself, could you really consider and assess a five-year sentence under any circumstances?

MR. CUNNINGHAM: Your Honor, we'll object to that as an improper question in that, if he felt that the ?roper sentence was five years.

THE COURT: Do you understand that, Mr. Rand?

MR. RAND: Uh—huh.

THE COURT: Go ahead and answer the question.

A Okay, I could consider it.

Q If you were sitting as one of the jurors in that box, could you sign your name saying, I'm not just thinking about it; "I'm going to give this guy five years. He killed somebody. He knew he was going to do it. He did it, but I'm going to give him five years."?

[1846] MR. WEST: Your Honor, again, that's an improper question. If the facts and circumstances call for it and he believed in his heart that the person should get five years. Improper question.

THE COURT: Ask the question, Mr. Nelson; one more time. Your time is up though, but go ahead and ask it one more time.

Q Mr. Rand, again, I'm just trying to find out what you really feel, down inside what you really feel, okay, You've convicted somebody of murder, not voluntary manslaughter; not self—defense, no accident. You've convicted them of murder, knowingly or intentionally causing the death of another human being and you've found them guilty beyond a reasonable doubt and you're sitting on the jury. You've heard all the facts and circumstances, You know everything you're going to know, You've said, in a proper case, you could

consider five years, but you also kept saying that, if it were up to you, in [1847] your heart, you would want to give more. Am I right about that.

A Yes.

Q Okay. So even if the facts and circumstances justified i1 where you could consider it, being real honest about it; could you give it?

A Yes I could.

Q Is there any question about that; because you've changed from what you told me before?

A No—well, I don't know. From the first time you asked me to now, if maybe the way you said it or my understanding was different, but I could consider it and, if shown, yes. But under the same token, I would think that I would go the way also.

Q You understand that nobody is going to prove to you—

MR. WEST: Excuse me. Your Honor, I think the State's time is up. We keep going over it. He's already said that he could [1848] consider it and, under the proper facts and circumstances he could do it. The State is asking for additional time and the Court has already told him that his time was up. I thought he had already asked his one question and now he's going to something else.

THE COURT: Mr. Nelson, bring it to a close.

MR. NELSON: I'm trying to, Judge, but he said something else in the same area that I want—

THE COURT: I think probably the lawyers could be here all afternoon the way we're going.

MR. NELSON: Is the Court stopping me at this point?

THE COURT: Go ahead and ask one more question.

Q I've forgotten exactly the words you used now, Mr. Rand, but you're telling us—well, you said if it was proven to you that he had to get ninety-nine years—I think the words you used were something to that [1849] affect—or it was proved to you that he had to get five years—

A That it was adjustable on that case.

Q You understand that it is always going to be your decision? It's up to you. Nobody is going to prove to you that anybody has to get five years and, if you couldn't consider and assess five years in a proper case, then that's fine. Nobody is going to get down on you for being a bad citizen or anything else because you can't. We just need to know.

A I could consider it, but I couldn't sit here and say that I would give it to him. Is that what you're asking?

Q Well, we can't commit you right now to saying that you would do it.

A I could consider it, but I couldn't say whether I would give it to him.

Q The law says consider and assess. Okay. Not only consider, but you have to be able to tell us that you could give it.

A Yes, I could.

Q You're saying that you could?

MR. WEST: He's already [1850] answered the question two times, Your Honor.

THE COURT: Well, he's through now. Mr. Rand, the only question I want to ask—and ably tired of these lawyers asking you questions, but let me sum it up to make sure tha I understand. The law says that everyone of these twelve jurors who are going to be sworn in this case has to have an open mind to the entire range of punishment that might be provided for in this particular case. Now, earlier on—and we're not

even arguing about this—you told the State a capital murder case, they proved those questions to your satisfaction beyond a reasonable doubt, you could answer them yes. We're not talking about that. We're talking about a case where you, as one of the twelve jurors, has found a [1851] Defendant guilty of the offense murder, which is the intentional or knowing or both causing the death of some individual by some manner or means. The punishment range for that offense of murder, under our law—it applies in all murder cases and not just this one, but in any murder case is a prison sentence of not less than five nor more than ninety-nine years or by a life sentence. I don't know if the lawyers mentioned it or not, but there is also an optional fine of up to $10,000.00, if the jury wants to fine in addition to a prison sentence.

Now, what the law says is, each juror who is seated must be able to within that range depending on what the facts and circumstances of that particular case tell you, as an individual juror and then [1852] you working together with the other eleven jurors, is a proper punishment in the case. Now, what the lawyers are asking you is, and it was asked several different ways at several different times—now, let me qualify my question by telling you some of the things the lawyers said.

You don't have to imagine a case it would take for you to assess any particular punishment. In other words, you don't have to be able to tell me, well, I could give ninety-nine years if it involved killing a baby or something like that or I could give five for this or that. In fact the law wouldn't even let you do that because that means in my mind and, I think, in the law's mind that would be the only case in which you could do that particular thing. The law doesn't require you to imagine the facts [1853] it to vote for some particular punishment. The law does say that you have to have an open, mind to the entire range of punishment so, if you heard a set murder case, after those facts and those circumstances, having found the

Defendant guilty of the offense of murder—and we talked about what that was, but you found him guilty of murder—if the facts and circumstances presented themselves to you and in that particular case you thought a proper punishment was a five year sentence, which is the minimum sentence, you could and would vote to assess that as the punishment in the case. Now, the question to you is, in a proper case, if the facts and circumstances warranted it in your mind, could you and would you vote to assess a five-year sentence?

[1854] MR. RAND: Yes, I think I could keep an open mind.

THE COURT: Can you give me a yes, I would—

MR. RAND: Yes.

THE COURT: —or a no, I wouldn't?

MR. RAND: Yes.

THE COURT: I'll hold that qualified, Mr. Nelson. What says the State?

MR. NELSON: At this time, Your Honor, the State would exercise a preemptory challenge.

MR. WEST: Your Honor, I want the record to clearly reflect that—

MR. NELSON: Could we take this up outside—

MR. WEST: Judge, I think it should be taken up in front of Mr. Rand's face.

THE COURT: Well, I'll let it be done at this time.

MR. WEST: I want the record [1855] to clearly reflect that Mr. Rand is a black male and he's twenty-three years of age.

THE COURT: Mr. Rand, thank you for your patience with us, first of all. You will be excused from service in this case. If you would leave your badge with the bailiff as you go out—this is off the record, Pam.

(Whereupon, an off-the-record discussion was held, after which the following proceedings were held.)

MR. NELSON: The State exercised its preemptory challenge because Mr. Rand was ambivalent about the death penalty and at the first of the voir dire, his ability to serve on a jury like this and he stated himself that he wasn't sure whether he fitted in category one where he could serve on the jury or category two where he could not. That was the [1856] State's concern for exert preemptory challenge in this case.

THE COURT: Let's take a short recess so I can make a phone call I should have made two hours ago.

MR. MACALUSO: Judge, if I may say something. I realize that everyone has the right to make a legal objection, I guess, at the time. I didn't really actually keep count this last time, but if there were ten objections over this very limited area, ten nonlegal objections, to questions—and I miscount—all I'm asking, Judge, is, if we stand up and make nonlegal objections, the Court call it to our attention, as I've asked the Court to do with the other lawyers in this case, if we're ever going to get a jury in this case.

MR. CUNNINGHAM: Your Honor the only reply we would make to

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[1866] JEANETTE BUTLER,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUBO:

Q Good afternoon, Ms. Butler. Let me begin by reintroducing every one here. I'm Paul Macaluso. This is Jim Nelson. Another lawyer, a district attorney, will be once the

trial begins. His name is Kinne. We haven't seen Norman in a because he has the chicken pox. fifty years old and he's been disabled, of course, for about two weeks. It makes a difference at that age.

The gentlemen to Jim's immediate left is Brice Cunningham.

MR. CUNNINGHAM: How are you, Ms. Butler.

Q The gentlemen who was just in here a moment ago is Mr. Royce West. They were introduced to you this morning, also. We are assistant district attorneys who represent the

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[1870] position or try to talk you out of a position. Just tell us how you feel about anything and you'll be doing your job as a prospective juror.

What we're trying to do here is find twelve people who are best suited, twelve that we both agree on, both sides agree on, and can actually serve on this type of case because not every one can. I mean, you're number thirty-eight and we only have two jurors. see arithmetically how few people are suited to serve on this type of a case.

Now, let me tell you what our position is just in fairness to you going into Ms. Butler, we are actively seeking the death penalty in this case for Thomas Joe Miller-El and we make no apologies for it. We know that the law allows for it under certain circumstances and we intend to be able to provide a jury—and that would mean you if you're on this jury—the type and qualify of evidence that would convince this jury beyond a reasonable doubt in the first part of the trial that Thomas Joe Miller-El is guilty of the offense of capital [1871] murder. That's our responsibility.

Then in the second part of the trial, to provide the jury with the type and qualify of evidence that would convince them that the questions that the Judge would give you at the end of

the trial, those three questions there, should be answered in each instance yes, yes, yes. You know that the effect of three yes answers—what is that?

A The death penalty.

Q That's right, automatically. You might as well write death in there. Three yes answers dictates to this Judge, under the law, what he must automatically and definitely do. Now, the reason why I say that is just to put you on notice. You know a lot of people come down here and they're kind of caught up and they don't realize—you know, they think they're going to be on a shoplifting case or a marijuana case or a burglary case and here they are. They're sent down to a jury room where they're talking about death and capital punishment. You see, it's no longer, like it may have been, where you read about something or you talk about it with your husband or [1872] people you work with or your friends, about how you feel about the death penalty. You're in the thick of it basically. I don't know of a better way to put it. We just want you to know what the stakes are here and we intend to provide this jury with the type of evidence that ultimately will result in convicting this man ultimately result in this man being taken down to Huntsville, Texas, strapped to a bed, a hospital bed, taken into a room where they will put a needle in his arm and they inject him full of a lethal substance that going to end up killing him under the law.

Anyone who comes down here, like yourself, as a prospective juror, just in fairness ought to know what the stakes are and what you would be called upon to do under the law based on the evidence if you serve on the jury. It kind of goes back to what the Judge said. The Judge it's kind of like—I know he said this to other jurors that he talked to—it's kind of like you're given a job description. Just like this job you're taking now, I'm sure you wanted to know what it entailed, didn't you?

[1873] A Uh-huh.

Q If it wasn't what you set out for, then you're not going to sign up for it, are you?

A That's right.

Q In fairness to you—and we could hide the ball and say, you just answer these questions and then at the end you find out that someone is being executed what effect that might have on certain people?

A Uh-huh.

Q All right. I'm going to stop and let you do some talking. It's your opinion that we want to hear. You were asked the question how you feel about the death penalty. They only gave you three lines and you've got almost four lines. There's nothing magic about those three lines. You were given precious little time to think about this. I mean it's not like you had a week or so to dwell on it.

Would you just tell us in your own words how you feel about the death penalty?

A I think it should be given. The death penalty should be given in certain circumstances. As I said people hurting

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[1945] were held.)

THE COURT: Do you-all want to argue?

MR. CUNNINGHAM: I don't. THE COURT: Let me get on Mr. Cunningham, sustain the State's challenge to Ms. Butler. The court is going to let the record reflect—and I'll let the lawyers challenge me on this. This lady really an interesting juror. I think she was somewhat emotional in appearance from time to time, but I don't have any doubt that—well, she didn't always accept what the lawyers said as gospel or the Judge, for that matter. I think she probably understood what her situation and relationship would be as a

juror in this case. After watching her and hearing all of her answers, this Court believes and finds that her views about the death penalty

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[1948] LOUISE CARTER,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Ms. Carter. As I was introduced to you earlier, my name is Jim Nelson. I'm an assistant district attorney here in Dallas. The gentleman seated next to me is Mr. Paul Macaluso. As I think you were told this morning, there will be one other gentleman involved in this for the State of Texas and his name is Norman Rinne. Mr. Rinne who happens to be about fifty years old, is home again this week with the chicken pox and has been for a couple of weeks. We've given him a little bit of a hard time about that. will be presenting the evidence for the State of Texas in this case. The three of us are a assistant district attorneys and have been assigned to this case by Henry Wade, the elected district attorney, to handle it for the State of Texas.

* * * *

[1998] minutes and you'll be on your way one way or the other.

Mr. Carter, maybe I don't send you out. Maybe I can decide this. Ms. Carter, I'm going to excuse you from service in this case. I'm going to sustain the State's challenge. Off the record, Pam.

(Whereupon, there was an off-the-record discussion, after which these proceedings were recessed to Tuesday, February 18, 1986, at which time the following proceedings were held.)

THE COURT: I want to ask you, to make yourself as comfortable as possible. Sometimes that is easier said than done. The reason you're up there is because it gives us a chance t hear you and the lawyers to see you better from up here and everything. The only thing I want

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[2000] CARROL S. BOGGESS,

called as a jury panel member, having been sworn by the Court to testify to the truth whole truth and nothing but the truth, examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning. I'm trying to crank up on time here this morning and get my voice going here. Ma'am, let me begin by reintroducing most of the people who will be involved in this case. We were introduced to you the other day. My name is Paul Macaluso and the man that just walked out, who will be seated right next to me in just a moment, his name is Jim Nelson. Once the trial begins, we will be joined by another lawyer. His name is Norman Kinne. We're all assistant district attorneys and we work for Henry Wade who, I'm sure you know, is the district attorney here in Dallas. He's designated us as the lawyers to represent the State in this case.

Now, the gentleman that pointing to at this moment is Mr. E. Brice Cunningham.

[2001] MR. CUNNINGHAM: Good morning. How are you?

Q I imagine in not too long he will be joined by Royce West. He will be seated between the Defendant and Mr.

Cunningham. Mr. Cunningham and Mr. West are defense attorneys who have been appointed by the Court to represent the Defendant. He is seated to your very far right. You can see him, I think, if you lean forward. He's in the powder blue sui there. His name is Thomas Joe Miller-El. He is charged with capital murder and he Defendant. Dow, the reason why I've taken—that's Mr. Nelson.

MR. NELSON: Hi.

Q The reason why I've taken the time to reintroduce every one here is to let you hear our names again and then reacquaint you with the roles that we all play in this case so you know what we do or are supposed to do. would just like to ask you if you know or recognize any one of us?

A From yesterday.

Q Other than from yesterday?

A No.

[2002] Q I know your husband works in the office. I think I know—

A I'm sure you know him. He's beer here a while.

Q He's been around for quite a while, hasn't he?

A Yes.

Q I don't think that we have ever met. I don't recall having met you, but I see Joe here all the time. As you will know, Ms. Boggess, you are a prospective juror on this capital murder case. As I'm sure you know at this time, capital murder is a very, very serious offense. In fact it is the most serious offense under the laws of this state, as you well know, serious because of the nature of the offense. Obviously it involves a capital murder. Equally as serious, I suppose, because of the two possible penalties for a person who is convicted of capital murder. You know if a person like Thomas Joe Miller-El is convicted of capital murder, then he can receive only one of two possible penalties. one is a sentence of death by lethal injection [2003] in his arm or a sentence of life in the Texas Department of Corrections.

You can see obviously how serious everything is connected with this type of case. Probably because of that, Ms. Boggess, the law allows us to talk to you individually as we're doing now. Have you ever been down here on jury duty before?

A Uh-huh. I don't remember the year. I think it was a couple of years ago.

Q It was a civil case, do you think?

A Uh-huh.

Q If you were talked to by the lawyers as I'm pretty sure you would have been, you were probably talked to when you sat out there in the gallery, weren't you, and you were asked questions and you answered up in front of everybody else. That's fine for most cases because most cases don't involve the death penalty and how you feel about the capital punishment laws and the death penalty statute and so forth and so on. The law allows us to talk to you individually, kind of semi-privately, like we're doing now because they want you to relax as much as you can. Are you [2004] a little bit nervous?

A No, not really.

Q Well, there is no need to be nervous because nothing yu can say will be wrong. For that matter, it won't be right, just as long as you tell us how you feel. No one is going to quibble with you or quarrel with you, argue with you, try and talk you into anything or out of anything. You are the most important person here in this room right now and your opinion is the most important opinion. So whatever is on your mind, I don't care what it is, if it affects your service as a juror, you just tell us, all right, and you will be doing your job. If we ask the right questions, we'll be doing our job. Fair enough?

A Uh-huh.

Q Now, if you have a questions about anything, Ms. Boggess, by all means ask it because, you know, when you get on the jury you can't ask questions ordinarily of the

witnesses and the lawyers and so forth. If there is anything that you need to tell us, whether we touch on it or not, by all means let us know, all right, just in fairness to both sides.

[2005] Now, in fairness to both sides, let me tell you what our position is just from the very beginning. Ms. Boggess, we are actively seeking—that is, the State is actively seeking the death penalty in this case for that man right down there. It's only fair that we tell you right from the very beginning what our position is and what we intend to be able to prove and establish once the trial itself begins and then, of course, what would be expected of the jury on the basis of that evidence. We are actively seeking the death penalty. That is, we intend to provide this jury with the type and the quality of evidence—and that would mean you if you were on this jury—that would convince the jurors beyond any reasonable doubt that the Defendant, Thomas Joe Miller-El was guilty of capital murder just exactly as he is charged.

Then in the second phase of the trial, once again, to be able to provide that jury with the type and the quality of evidence that would convince them beyond any reasonable doutbt whatsoever that those questions that the Judge will give the jury at the end of the [2006] trial should be answered yes. All yes as you know, would result in the law requiring the Judge to sentence Thomas Joe Miller-El to be taken some day down to Huntsville, Texas an at an appointed time—the law designates the appointed time—he be taken to the death house to have a needle placed into his arm and thereafter have a lethal substance into his body to cause his death as the law requires under those situations.

I'm not trying to make this sound real gory or gruesome, other than the fact, ma'am, that it is only fair to you and every other juror—we've talked to about forty so far—to let you know exactly what the stakes are in this type of a case. I think you know anyway, but it wouldn't be fair to you to lull you

into some sense that this is going to be some kind of a—any other type of case when we know it's not and what the stakes are ultimately.

I think, as you well know, Ms. Boggess—you're thirty-seven years old and you know the difference between fact and fantasy o something you hear on TV or read [2007] about and then something when you're caught upright in the midst of it. Do you see what I'm getting at?

A Yes.

Q It's one thing to sit around and talk about what you might do in a situation, what you would like to do or what ought to be done and frequently—I know. I'm forty-three years old myself. I know that it is quite a different situation frequently when you're actually called upon to do something yourself. Do you see what I'm getting at?

A Yes.

Q That's what we want to know and that's why we're talking to you as intensively as we are. The reason I say that is this: You were asked about your feelings about the death penalty and whether or not you could actually serve in this type of case. As you well know, a lot of people have real strong feelings one way or the other about the death penalty, strong feelings one way or the other about whether or not they can actually serve on this kind of a jury because of their personal or conscientious feelings or religious or moral [2008] feelings one way of the other.

Now, I've done a lot of talking here so far as an introduction. Really what every one wants to hear is what you think and how you feel. I know you were asked this question yesterday and were given those three lines there to respond and very little time could you share now that you've had a night to sleep on it, to think about it, what your really about the death penalty and whether or not you can actually serve on this type of case?

A Well, I believe I could serve case like this, but whether I want to or not is a different thing. I wouldn't want to serve and I wouldn't want to have that responsibility to do that, but if it fell upon me, I would certainly take it and pray to the Lord to help me get through it. My feelings about the death penalty are just as I said, if I believed that a person truly had committed a murder, a premeditated murder or a murder—you know, intended to do something like that, then I would feel that it was my duty to judge that [2009] person and to decide whether or not that person you know—

Q I gather from what you're saying you feel strongly, obviously, about murder?

A Yes.

Q That a person ought to be held accountable for a murder type offense?

A Right, or punished for any type of crime that they commit.

Q I notice you put down here on your questionnaire, "Do you believe in the death penalty?", "Yes—only in cases of premeditated murder." I think you went on to qualify it by saying for an intentional murder?

A Right. I wouldn't want—you know, like the Judge talked about, self-defense or an accidental thing or something like that. I certainly wouldn't want to judge a person on that.

Q We'll talk about that in some detail in just a second, but you understand that a person can only receive the death penalty in Texas for a capital murder. A capital murder involves a murder itself. That's a component of capital murder. It's [2010] what we call regular murder—actually it's not called regular murder. It's just referred to as murder.

Murder itself is not a capital offense. In other words, you can't receive the death penalty for what we call regular murder. For example, if I kill Mr. Nelson and just kill him for whatever reason I have for killing receive the death penalty for his murder no matter how violent or brutal or vicious it may have been unless he falls undera particular category. For

example, if he is a police officer and I murder him and I know he on duty, I can receive the death penalty for that kind of a murder. But if it is just Jim Nelson, the district attorney, I can't do that. I can't receive the death penalty because that's a regular murder. If I killed you or you killed me, you see, that's regular murder. That's altogether different in the range of penalty. If you kill a jail guard or a fireman, mass murders, you see, murder for hire, those are capital murders. Otherwise, murder itself is a noncapital offense. Murder is a situation [2011] where one person knowingly or intentionally causes the death of another. You have to understand that that does involve a knowing and/or an intentional killing. I knew I was going to kill him. I intended to kill him. I killed him. Do you see?

Now, what the Judge said about insanity, self-defense, accident or a crime of passion, if you're on a jury and someone is charged with murder, but you believe or you have a reasonable doubt that someone killed as the result of insanity, self-defense, accident or a crime of passion—we'll talk a little bit more about in detail later—then you don't make it a lower sentence, you see, because if you believe that it is one of those four things, it's not murder, you see, because those are legal defenses or legal justifications for somebody killing somebody else. Do you see what I'm getting at?

A Uh-huh.

Q If you believe that I killed Mr. Nelson because I thought Mr. Nelson was going to kill me or he came at me with a knife and I got my gun first and shot him, you see, then [2012] you don't give me a lower sentence because you thought I acted in self-defense. You find me not guilty just like I would have to find you not guilty if that were the situation and I were on the jury. Am I making myself clear?

A I suppose, but let me go back and say this: I'm not saying that I feel like I could impose the sentence myself—or I'm not going to be imposing the sentence; is that correct?

A Uh-huh.

A I'm trying to figure out why you've explained all that to me. I understood that, but what I'm saying is, it's not the jury's—it's not my decision to say whether or not he gets the murder penalty or not because that's already been established. The fact is, is he guilty of the crime or not, is that not what the jury is—

Q Well, that's partially correct and then it's a little bit confusing because this is a fairly complex area of the law. Let's talk a little bit about that. You understand that in any criminal trial—you see, any criminal trial is conducted in two parts, [2013] whether it be capital murder or shoplifting. The first part deals only with whether or not guilty. In other words, if the State has accused somebody of capital murder or if the State accuses somebody of shoplifting, the State has the burden of proof in all cases. We have to convince you that the person is guilty of capital murder or shoplifting, whatever the case may be. That's the only decision the jury makes.

Let's say if you find him not guilty, obviously the trial is over. find the person guilty of capital murder, we go on to the second phase of the trial where the penalty id determined. There is nothing automatic about somebody being the death penalty just because they are convicted of capital murder. It's not automatic. There's an option there based on the answers to questions.

Now, years ago, up until about thirteen years ago, jurors, after they convicted someone of capital murder, would listen to whatever evidence may be presented in the second phase of the trial—although there [2014] is no obligation for either side to present any more. You may have to make a decision just on what you learned about the offense itself. After the jurors heard the evidence in the first part or the trial, heard all of the evidence, they would go back and actually decide penalty or should they get a life sentence or should they get a number of years. It's like in the movies. You know, you've

seen those movies where the jury comes back and they say, well, we think he ought to hang for that or he ought to get the electric chair, whatever it was, and they actually voted for that. If all of them agreed it should be death, they all gave death.

Let me ask you, do you feel you're the type of person who could make that kind of decision directly?

A I've never been in that situation. I don't feel like I would want to be in that situation and whether I could do it or not, I'm not real sure.

Q Well, that's the reason why we spend the length of time with you now because, [2015] you know, rely—everyone here has to rely on your service as a juror on that you tell us now. There will be times when I talk to you, Ms. Boggess, where you're—you're going to answer questions probably in the same way I would and everyone else here would if we were in your shoes. I think so. Maybe. I don't know. You understand how important your answers are to everybody here. I don't want to make it sound like I'm putting any pressure on you, but the law does require that we kingpin you sown on some things, simply because the law requires it.

A I understand.

Q You see, if you say I think so, that means you may or you may not. Neither side can make a decision here and neither can the Judge on an answer like that, even though it's very human for you to answer that way. Do you see what I'm getting at?

A Yes.

Q One of the reasons I mention that is, in question fifty-eight it say here, "Do you have any moral, religious, or personal beliefs that would prevent you from returning a [2016] verdict which would ultimately result in the execution of another human being?" and you said, yes or you circles yes here. Could you talk a little bit about that?

A Well, I guess what I meant by that is, I do have difficulty—I've never been in a situation like this before, like I said. I believe that the bible states—and I am a Christian and I believe that the bible states that, if someone commits a crime or commits a sin or whatever you want to call it, there is a punishment and it is up to the people that love that person, the Christians or whatever, to punish that person for that particular crime because God will punish him and I believe he puts us down here to do that same thing. That's what I meant, but now whether or not I could actually go through with murder—with killing another person or taking another person's life, I just don't know. I'd have trouble with that.

Q Okay. You're not the first person to have voiced that opinion. That's why this is as tedious as it is and takes as long as it does because actually nobody wishes to put you [2017] or anybody else, Ms. Boggess, on a jury or in a position to have to do something—let's say to follow their oath as a juror, if they accept that oath—that is going to violate their conscience or their personal feelings that they've held for a long time if that's the situation. Do you see what I'm getting at?

We're not trying to make somebody do something against their conscience. It's just that simple. Sure the law does expect you, as a citizen of this community, to serve on a jury if you can. The law does not expect you, me, these other lawyers or anybody else to serve on a jury or do anything in violation of. their conscience.

Now, there is a big difference, as we all know, between a decision that may be difficult because certainly on a death penalty case, it would be difficult for anybody, I suppose. I'm sure it's not going to be an easy decision for anybody. For some people and, in fact, a lot of people, it's more than just a difficult decision. It's a decision that would cause them, because of the enormity or the magnitude of the situation, you

know, being a [2018] part of someone else being executed, they simply feel that would be a violation of their long—standing personal feelings and conscientious beliefs. Do you see what I'm getting at?

A Yes.

Q That's why the Judge told you that the oath the jurors take is an option. You have the opportunity, you or me or anybody, or the option of taking the oath or not taking the oath. It really is—I like the way the Judge put it. Be said it was kind of like a job or a job description. When you go and you interview for a job, you find out what all is involved because you want to know what is going to be expected of you once you sign on. Obviously, you're not under any obligation to sign on ordinarily for a new job until—you know, you want to know what it entails and what it involves and what you're expected to do and then whether or not you can do it or you want to do it. Do you see?

Now, that is kind of like this situation. If you're on this jury, for example or anybody is on a jury, you know that the [2019] result of three yes answers to these questions, if the State proves to you or anybody that these three questions should be answered yes, this Judge, I guarantee you, will sentence this Defendant to die. The Judge has no option. I know that the Judge is not going to get mad at me when I say this, Ms. Boggess. Be has really little to do with the decision as to life or death. In fact, he has virtually nothing to do except to carry out the will of the jury on the basis of those three answers. You see, three yes answers equals death. Although you don't write death in there like you used to, you might as well. Yes, yes, yes, equals death because the Judge can't change the verdict. Do you see what I'm getting at? If a person is on a jury that last yes equals death. DO you see what I'm getting at?

Now, that's part of the job description and ultimately it boils down to whether or not you feel like you could serve on

this jury and participate in the execution of another human being, that it was something that would both your personal conscience or your personal beliefs. If it doesn't, then you [2020] would probably be qualified to serve. If it does, then there is no requirement that you take the oath. Do you see what I'm getting at?

A Yes.

Q Now, let me back up for just a second. Maybe this might be helpful to us in discussing this. I hate to do this because it puts people in categories and I know it's hard to do sometimes and probably unfair, but it serves a purpose, I think.

When it comes to death penalty juries and capital punishment, people may be divided into four categories. In no particular order. I'm sure you know, before I go any farther, that rather a person serves on this type of a jury or a person doesn't serve, that doesn't make you a good citizen or a bad citizen because, if it were that way, then we would have about thirty—nine people that were bad citizens. We have only two jurors. We've talked to forty people. Do you see what I'm getting at?

A Yes.

Q You understand that. You don't get any points for serving on this kind of a [2021] jury or any demerits if you don't.

The first category of individual let's say is a person who believes in the death penalty, they believe it is a deterrent to crime or it's necessary for whatever reasons and furthermore, if they had to, they could serve on this jury and they could render a decision that would result in Mr. Miller-El's death. It wouldn't violate their conscience.

The second group says, well, I believe in it and I think we probably need it or it serves some purpose, but because of my personal beliefs or my conscientious beliefs, my religious or

my moral beliefs, I'm just not suited to serve on this kind of a jury. I could serve on a noncapital case, a burglary or a robbery or a murder that didn't involve the death penalty, but I'm just not suited for this type of a case.

Let's say there is a third category that say, I don't believe in it, the death penalty, but if it's the law, I guess my feelings aren't that strong and I guess I could serve on it.

Or a fourth category that says, I [2022] don't believe in the death penalty and my feelings are so strong that I could never return a verdict that would result in anyone being executed. No way.

Now, I know these are general categories, but do you see yourself falling into one of those four?

A Yes.

Q Which one is that?

A I probably would pick the first one.

Q You do believe in the death penalty?

A Yes.

Q And you say you could serve on the jury?

A Yes.

Q Even though it meant that it might be a tough decision?

A Yes.

Q Even though it meant that, if you answered all three of those questions yes based on the evidence, you know it would result in the execution of this Defendant?

A Yes.

[2023] Q So whatever personal feelings, religious or moral, that you have, you would not have to compromise them; you could serve on the jury and go ahead and answer those questions?

A Yes.

Q Is there any doubt in your mind about that at all?

A I could always tell the truth.

Q That's all you're expected to do. We have to come forth with the evidence to satisfy you beyond a reasonable doubt and, if we do, you answer the questions yes. If we don't, you answer the questions no. You know that the result of one or more no answers is a life sentence and those are the three questions that the Judge talked about yesterday that decide life or death.

Now, let me just cover one thing with you. You understand that in the old days, under the old law, the jurors decided on a personal basis. If you heard a fact situation, you heard about a defendant and a crime that made you mad enough, I guess, or caused you to feel that way, you would actually vote for [2024] death or life, if you didn't feel that way, or some number of years. Do you see what I'm getting at? It's a very personal decision.

We know that being on a jury, even though you don't make that decision directly, instead you answer the questions, you know that the result is the same, don't you? It could be death or life depending upon the answers?

A Yes.

Q The law expects you to put aside your feelings, your personal feelings, one way or the other and not let them influence your decision. Am I making myself clear?

A Uh-huh.

Q We all know, however, that we're obviously not robots. If I were on a jury, I might have a personal feeling. I might say, well, after I heard the evidence, or you might say, I think this guy ought to die for what he did. I'm not talking about Mr. Miller-El. Let's just talk about an example. You know, you might say, for what he did, I think this guy ought to be boiled in oil, if it were up to me. In any case, I think he ought to die, but when it comes time to answering these three [2025] questions, let's say you look at them in all honesty and find out that we have not satisfied you that one or more of the questions should be answered yes. In which case, you know,

your oath as a juror would require you to answer the question no. Could you do that, go ahead and answer the question no knowing that it would result in a life sentence and not the death sentence that you personally desire? Do you see what I'm getting at?

A Yeah. I could answer the questions on the basis of the truth, the facts that I felt like were the truth.

Q You see, the flip side of that coin, don't you?

A Yes.

Q Let's say you're on a jury and you say, well, this may be capital murder, but I don't think the guy—you know, if I could vote directly, I don't think the guy should die?

A Yes.

Q But I look at those questions and, yeah, they proved to me that he did it deliberately. Yeah, that's true. I can answer [2026] that yes. I think he probably would commit some criminal act of violence, so I can answer that one yes. And three, I believe it was unprovoked. Do you see what I'm getting at? Three yes answers in that situation would equal death. Could you put aside your personal feelings for a life sentence and answer those three questions yes knowing that it would result in the execution of that Defendant which would be contrary to your personal desire?

A I still back and say, regardless of my feelings, I would hope that I would not judge him by how I felt personally, that I would judge him by what facts I heard.

Q That's what the law would expect. Let's shift gears here for just a second and let's talk about a situation that I'm not saying would ever come up, but we have to discuss it at this time. You know capital murder, the type of capital murder that we've alleged in this indictment, as the Judge referred to it and as we call it also, it's murder plus. We have the murder, the knowing or intentional killing of another human being, but no legal excuse or justification. It's [2027]

couple with another very serious offense, another felony offense, murder during a robbery, for example, as alleged here. Okay. That's one type of capital murder.

I gather from what you told us, because that's what the law is, that's the type of capital murder you believe the death penalty could be called for depending on the facts and circumstances?

A Right.

Q The other type is murder during a burglary, murder during a rape, murder during arson or murder during a kidnapping, murder plus. Do you understand that murder itself is not a capital offense. But when you commit murder during a robbery, then it goes up to capital murder. Do you see what I'm getting at?

A Yes.

Q Now, let's say that you're on a jury. Just imagine for a second that you're on a capital murder jury. The State has alleged murder during a burglary, a capital murder, we proved the murder. There's no doubt about it. You don't have any doubt that the Defendant [2029] killed somebody with no legal excuse and no justification for it under the law at all. It was knowing and intentional, but you didn't hear any testimony about a burglary. Do you understand, if that were the situation, if that situation occurred, you could not convict that individual of capital murder for the very simple and obvious reason that we didn't prove capital murder. What did we prove?

A Just regular murder.

Q You got it. That's right. When you find him not guilty of capital murder because we didn't prove that and find him guilty of what we did prove, which was what? You said murder. Well, if that were to happen, you forget all about the automatic life or death, you see. Those are no longer options for regular murder. The range of penalty for murder is very, very broad under the laws of the State of Texas.

I want to go back to what we were talking about earlier. That is where we're talking about the murder offense. You talk about the range of penalty for murder, not capital murder, but regular murder, then you [2029] must exclude from your thinking a homicide, in other words a killing, where one person kills another person knowingly or intentionally, you must exclude what I said earlier, self—defense. When you think about murder and the range of penalty, high or low or somewhere in between, you must exclude self—defense because, as I said earlier, if you believe someone killed somebody in self—defense, they've got a right to do that. You have to find someone like that no guilty.

What I'm saying is, I don't want you to be thinking, well, I can give X number of years lower because someone killed in self—defense. If you think someone killed knowingly or intentionally in self—defense, you have to find them not guilty. The same thing would hold true if you thought it was an accident. That's not a lower penalty. That's not guilty. I mean, if the gun went off accidentally, you don't give someone a lower sentence. You find them not guilty.

If you believed someone was insane at the time that they knowingly or intentionally killed somebody, well, that's not [2030] murder either. You find them not guilty. Am I making myself clear?

A Yes.

Q Or if you found, for example, that somebody killed someone in the heat of sudden passion. For example, somebody comes home and finds out that their child had been sexually molested by a neighbor. The neighbor is up the street and he is laughing about it. The father flies off the handle, goes into a rage, picks up his gun, goes up the street and kills the neighbor. Well, the law doesn't excuse that, but it doesn't call it murder, either. It's less than murder. It's called

voluntary manslaughter, so don't be thinking about that. That's not within the range of penalty. Am I making myself clear?

A Yeah.

Q Now, having set that stage—and I'm just asking you for your personal opinion, all right? If you believe one person knew he was going to kill somebody, intended to kill somebody and did it, no insanity, no accident, no self—defense and no heat of passion, what do you think the minimum ought to be, Ms. Boggess, [2031] for that sort of an offense, for that kind of murder, a knowing and intentional murder?

A I don't have any problem with what I think. It's what I believe and I believe that the bible says that person should be put to death. That's in Romans and that's my belief. Whether I want to be the one to decide that is—

Q In other words, in your personal feelings it should be death for knowing and intentional murder; is that correct?

A Right.

Q Let me ask you, ma'am, in that regard, knowing that the range of penalty is from five years to ninety-nine years or life for murder—that's what the law sets out—could you ever—would you ever feel it was proper—could you ever hear any facts or circumstances where you personally would feel it would be proper to assess a sentence as low as five years for a knowing and intentional murder—

MR. CUNNINGHAM: Your Honor, she—go ahead.

Q I think I'm finished.

[2032] MR. CUNNINGHAM: Your Honor, we would object to the form of the question because it fails to include if she heard the facts and circumstances of that case and she believed that the facts and circumstances called for five years.

THE COURT: Go ahead and ask the question.

MR. CUNNINGHAM: And, Your Honor, I think she should be told what the range of punishment is.

MR. MACALUSO: I think I just did, Your Honor. If I'm not mistaken I did say it was five years to ninety—nine years or life, didn't I?

Q That's what the law says, that the range of penalty for murder is five years to ninety-nine years or life. The law expects a juror, if he can. to tailor the punishment somewhere in between there. Let me just as you, do you personally feel—you know, that's why you're here. We're asking you.

A Let me explain something.

Q Sure.

A You know, my feelings about the law and my feelings about what the bible says about what the law does. I feel that, you know, the bible says that I should be under the government, the rule of the government. However, it says also to me that the rule of the government should be a biblical rule and if the rules of government are not biblical, then I'm not supposed to follow that, but follow my own beliefs biblically. I'm having difficulty with the fact that what the law decides is not biblical principle, but yet I'm still under the law. Not that I'm going to break the law, but I don't want to be a part of that particular—I don't want to go with the law just because it's the law, just because you say he should get five to ninety-nine or he should get death, because of this or the other, when the bible says, no, that's not the way I want it. Do you understand what I'm saying?

Q I think I understand what you're saying. You said personally you would vote for death. You think a person ought to receive the [2034] death penalty for that; is that correct?

A I'm saying that my personal beliefs, because I'm a Christian, says that, if someone commits a murder, then that's what the bible says. Whether or not the law says it, you know, is something different because—you've decided what you're

going to do. You know what I'm saying? The law has decided, now I'm supposed to follow the law, but only if the law states what is biblically right.

Q That's why we're going through and asking you all these questions. I'm out of time right now. The Judge has very graciously allotted us a specific amount of time, but I just want to ask you this last question. It's kind of a difficult question to ask.

Knowing yourself and knowing how you feel in your heart and in your mind and spiritually, for that matter, do you feel, ma'am, that there would ever be any facts and circumstances where you feel it would ever be proper or justified, that you could ever under any facts and circumstances, feel that a five year sentence, you could ever consider and actually vote for a sentence as low as five [2035] years, for the knowing and intentional taking of another human life without any legal excuse or any legal justification whatsoever? Do you ever feel it would be proper under any circumstances to vote for that sort of a low sentence?

A That's tough. I may—

Q You know, we have to pin you down on that. I know you haven't heard any facts. We can only go as far as we have. You've just got to search your heart and your mind. Just tell us how you feel. Do you feel you could ever—you would ever feel it proper under any facts and circumstances where you would be able to vote for as low as five years in the Texas Department of Corrections where one person knowingly and intentionally killed somebody, commits murder, without any legal excuse or any legal justification whatsoever regardless of the facts?

A I'd have to say yeah. I'd have to say that I may do that. It just depends on where my heart was and bow my faith—and what I had prayed about and how God had answered my prayers. You know, even though He says death

[2036] sentence for everything, the Lord does do different things at different times. He doesn't always kill everybody just because someone else kills them, so I couldn't say that.

Q Again, I regret this, but I'm going to have to pin you down at this point. It's either yes, you feel you could or you could not.

A I feel I could.

Q Do you have any questions at all of me, Ms. Boggess?

A No.

Q Do you know of any reason, whether we've touched on it or not, why you could not be a fair and impartial juror in this case?

A I don't think I could ever not be fair or impartial. I don't think I could ever not be fair and impartial, but I wouldn't want to serve on it, though, but that's my true feeling.

Q You've been very polite, ma'am, and very kind to us and very attentive and I appreciate it.

MR. MACALUSO: Your Honor, [2037] I'll pass the prospective juror.

THE COURT: Thank you, Mr. Macaluso. You have five extra minutes if you need it.

[2038 EXAMINATION

BY MR. CUNNINGHAM:

Q How do you pronounce your last name, please?

A Boggess,

Q Ms. Boggess, my name is Cunningham and to my immediate left is Mr. West. As Mr. Macaluso indicated to you, we have been appointed to represent Mr. Miller-El in this case. Just briefly I would like to ask you a few questions because I think you have answered their questions and based upon the law, you're qualified as a juror in this case.

On your information sheet for religious preference or your church, OCB, is that El or F?

A F, Oak Cliff Bible Fellowship.
Q Where is that located?
A It's on Camp Wisdom in Dallas.
Q I've been trying to figure in my mind where your husband works in the district clerk's office. Is his hair sort of salt and peppered?
A Yes. He is crippled.
Q Oh, he works in the back. I've [2039] known him a long time. This is for the purpose of the record. What is your race?
A Black.
Q She's taking down everything you say and unless we •ask you, it's not in the record. Do you teach Sunday school?
A Yes.
Q You're a member of the Visiting Nurses Association?
A Right. I'm a therapist.
Q Do you know Etta Bernice Johnson?
A Uh-huh.
Q How long have you known Etta?
A I don't know her personally. I just know her name.
Q She is also a member of your association?
A Yes.
Q You live at 5717 Fox Hill Lane?
A Right.
Q How long have you and your husband and children lived there?
A Almost eight years.
Q Are you and your husband buying your home there?
[2040] A Yes.
Q Two of them attend public school?
A Yes.
Q Is it public or private?
A Public.

Q Where does Ke'Andra go to school?
A Atwell Junior High.
Q And your son goes to school where?
A Turner. All three of those are boys.
Q Have you taken any other courses above your BS degree?
A No.
Q You don't remember what security agency your husband used to work for?
A I think it was Preston or something like that. I don't know if they're still in business.
Q What did he do for them?
A He rode the Surtran buses and monitored the bus drivers.
Q You've never had any criminal jury service?
A No.
Q How many times have you been [2041] called down?
A I don't know. I've only served once.
Q At least one time you served on a civil and while—or you took a recess and they settled it?
A Yes.
Q Ms. Boggess, you understand that in a criminal case, the State of Texas has the burden of proof in a case. That's these gentlemen over here?
A Uh-huh.
Q If you were chosen as a juror in this case would you hold them to their burden of proof?
A I beg your pardon?
Q The burden of proof is on the State to prove its case beyond a reasonable doubt. The law says that, if they do not prove their case beyond a reasonable doubt, the jury should find the accused not guilty. My question to you is, if they failed to prove their case beyond a reasonable doubt, would you have any problem with finding the accused not guilty?
[2042] A No, not if they didn't prove it.

Q In other words, if they don't prove it, not guilty. If they prove it, guilty. That's what the law expects and you could do that?

A Yes.

Q I'm not confusing you, am I?

A No.

MR. CUNNINGHAM: Pass the juror, Your Honor.

MR. MACALUSO: The State will exercise a preemptory challenge, Your Honor.

THE COURT: Okay. Ms. Boggess, you'll be excused from service in this case. We appreciate your attention down here today and your patience with us and tell Joe hello for me, would you? He's been a witness up here a few times. Have a good day.

(Whereupon, Ms. Boggess left the courtroom, after which the following proceedings [2043] were held.)

THE COURT: Go ahead, Mr. Nelson.

MR. NELSON: The State would like to put in the record at this time the following reasons for exercising our preemptory strike for Ms. Boggess: Number one, she stated that she wasn't sure she could actually give death and, as a matter of fact, because of the big decision in this case, she did not want to serve on this jury. It is my understanding that the Court is also placing the questionnaires in the Court's records. I would like to call the attention of the Court to where Ms. Boggess said she was a defense witness for her nephew who was evidently charged with stealing at one time. It is for those reasons that we chose to exercise our preemptory strike on this juror.

MR. CUNNINGHAM: Ordinarily, [2044] Your Honor, I probably would not say anything, but since the State is putting into the record that alleged reason for striking Ms. Boggess, I would point out to the Court that of the five blacks

that have qualified all five have been struck, by the State, those being; Roger R. Bozeman, number seven; Billy J. Fields, number nine; filbert Gitchaway, number seventeen; Virginia R. Smith, number nineteen; Joe A. Warren, number twenty-eight and now Ms. Carrol Boggess, who they just struck.

THE COURT: She was number forty?

MR. CUNNINGHAM: Number forty. Joe A. Warren is number twenty-eight.

THE COURT: Let me tell you what my records show.

MR. CUNNINGHAM: Did I say Virginia Smith—Bozeman, Fields, [2045] Gitchaway—no. Gitchaway was by agreement. I'm sorry.

Bozeman, Fields, Warren, Rand and Boggess.

THE COURT: Let me make sure that the record is clear. I show that Mr. Bozeman—

MR. CUNNINGHAM: Was their first strike.

THE COURT: I think that's probably correct. We've had several blacks either excused by agreement or for cause. Let me clarify something because I do remember now that we agreed or it should be clear that we're going to put into the Court's file any questionnaires of any the State's strikes because I can go back and get them in there. I don't know if I've got all of them in there right now or not.

REPORTER: I have them.

THE COURT: Mr. Cunningham, to make sure that the record is in [2046] the shape that you—all want it for any reason, will you make sure at some point after voir dire that Ms. Bardwell has the questionnaires of all the jurors that you want in there? I'm sticking some in the file as we go, but I prefer to let the court reporter keep track of that, if you—all wouldn't mind.

Let's bring in the next juror.

(Whereupon, these proceedings are continued in Volume V.)

* * * *

[2050] SHEILA WHITE,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. White. I want to start out by reintroducing every one who you met at least briefly yesterday. My name is Jim Nelson. The man seated next to me is Mr. Paul Macaluso. Another man who will be involved in this trial once we start putting on evidence is a gentleman by the name of Norman Kinne. Mr. Kinne, who is about fifty years old or so, has been suffering from the chicken pox and we've been giving him a little bit of trouble about that. When the trial starts, he will be presenting the evidence and taking, what we call, the lead in the case. The three of us, Mr. Macaluso, Mr. Kinne and myself are assistant district attorneys. We've been assigned by Henry Wade to handle this case for the State of Texas.

Seated immediately to my left is

* * * *

[2053] that's all we ask of you.

Now, I feel like you have a right to know at this point, Ms. White, what the position of the State of Texas and our office is in this case. We are actively seeking the death penalty in this case for that man right down there, Thomas Joe Miller-El. We feel like we will be able to present to twelve persons on a jury the type and quantity of evidence for them

to, first of all, convict him of capital murder and then in the punishment phase, enough evidence for them to answer those three questions there yes. If each of those questions are answered yes by the jury, that results as a matter of law in the death penalty. At that point Judge McDowell has no option whatsoever. If those three questions are answered yes, then Judge McDowell must—is required to assess the death penalty in this case. If one of those questions is answered no, then Judge McDowell is required to assess a life sentence. There is no option. He has no discretion in this matter at all. It's up to the jury and it's the jury's decision.

That's where we are and that's [2054] what we're planning to do. Each that—you filled out a questionnaire yesterday and I know you didn't have a whole lot of time to think about it and all this was kind of sprung on you. Most people come down here expecting to be on a civil case or a shoplifting case or something like that and you wind up on a capital murder case. There was one question on here about the death penalty and now that you've had time to think about it a little bit more and, I guess, sleep on it, I'm going to ask you, if you would, to just tell us in your own words how you feel about the death penalty and whether you feel it serves a purpose in our society or not?

A I don't disagree with the law, that there is a death penalty, but for my own self, I cannot in all consciousness, you know, say that someone is guilty and, yes, they should be executed,

Q Okay. Let me—you're the forty—first person we've talked to in one way or another in trying to select this jury. We have two jurors at this point. You can see from that that we've got one in twenty so far that

* * * *

No. 01-7662

Supreme Court, U.S.
FILED
2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,
Petitioner,

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX VOLUME II OF II

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[2103] JOAN E. WEINER,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Ms. Weiner. Ms. Weiner, let me begin by introducing every one here. I'm Paul Macaluso. This if Jim Nelson.

MR. NELSON: Good morning.

Q Once the trial begins, we will be joined by another assistant district attorney. His name is Norman Kinne. Mr. Kinne is not here primarily because—he may be here today. He's recovering from a bout with the chicken pox. I haven't seen him in over two weeks myself. He's about fifty years old, too. We've been ribbing him a whole lot. We're the lawyers for the State and we're representing the district attorney's office of Dallas County in this particulay case. I'm sure you already knew that.

To Jim's immediate left is Mr. E. Brice Cunningham.

* * * *

[2107] much as you can.

There are no wrong answers and no right answers and no one is going to grade you obviously when it's all over with. The idea is to just get you to relax and tell us how you feel and how you think. If you're just as straight with us as you can be and we ask the right questions, then you will be doing your job and we'll be done ours.

Ma'am, you know as well as I do that no one is going to quarrel with you or argue with you or talk you into anything or out of anything. Just tell us what is on your mind about

anything. I don't care what it is. By all means, if I'm not making myself clear, let me know. You're not going to hurt my feelings. If you have a question, ask it. If you have something you would like to tell us that wasn't covered by the questionnaire or our discussion, in fairness to both sides, just let us know what it is.

Now, let me tell you, in fairness to both sides, what our position is in this particular case. Ms. Weiner, we are actively seeking the death penalty in this case for [2108] Thomas Joe Miller-El. We know that the law allows for the death penalty in a capital murder case and we intend to be able to provide this jury, once it is selected, with the type and the quality of evidence that would convince them beyond any reasonable doubt whatsoever that the Defendant is guilty just exactly as he's charged in this indictment of capital murder.

Then in the second part of the trial, we intend to provide that same jury with the type and the quality of evidence that would convince them beyond any reasonable doubt whatsoever that the questions—and they're over there and we'll talk about them a little bit later—the Judge would submit at the end of the trial for the jury to answer should be answered yes. As you know, three yes answers equal a mandatory, automatic sentence of death for Thomas Joe Miller-El or anyone else so charged. We just want to put you on notice just as we've told every other juror that we've talked to just to let them know what the stakes are and what we intend to prove based on the evidence.

[2109] Now, it's up to the jury to decide whether or not we've met that test and that's obviously where you come in as a juror, so we think it only fair to let you know at the outset what our position is.

Now, with those remarks aside—and I've done more than enough talking to this point. We want to hear what you have to say. I know you were asked this question fifty six, "Do you

believe in the death penalty?" and they give you a couple of lines there and a few minutes, I guess, to answer it along with some other questions. Would you share with us, all of us here, your personal feelings, if you could, in your own words how you do feel about the death penalty and capital punishment and secondly, do you feel you could serve on this type of a jury and actually render a decision that would result in the death of the Defendant in this case based on the evidence?

A Gosh. I do believe in the death penalty. I could render a verdict that way, but it's a lot easier for me to say at home that beyond a shadow of a doubt, yes, I do. I mean, I do believe in the death penalty. I

* * * *

[2132] reasonable doubt. If we don't, you find him not guilty. In the second part of the trial, we have to satisfy you and convince you beyond a reasonable doubt that those three questions should be answered yes, otherwise you have to answer them no.

A Right.

Q You just let the chips tall where they may and let the law take its course and no one is going to quarrel with you.

I have just a few minutes left, Ms. Weiner, and I want to ask you some very important things. I'm not suggesting that this would occur, but let's just imagine for a second: Let's say you're on a hypothetical jury, a capital murder jury. Murder during a burglary, that's a type of capital murder. You know we have to prove murder and burglary if we expect you to find someone guilty of capital murder?

A Right.

Q Let's say you're on this jury and you hear all the testimony and you and the other jurors are convinced that a defendant killed the victim and there's no question about [2133] it. It was murder, but you didn't hear any testimony

about the burglary or you have a reasonable doubt about that. Do you understand under those circumstances, if that were to happen, you couldn't find that defendant guilty of capital murder, could you?

A No.

Q Because we didn't prove capital murder, did we?

A Right.

Q We just proved murder?

A Right.

Q So you find the Defendant not guilty of capital murder and find him guilty of what we did prove, which was what? Murder.

A Murder.

Q Were that to happen, the law sets out a completely different range of punishment. I think the Judge talked about that a little bit yesterday. There is no trick to it. The law simply expects, to be a qualified juror on a murder case, regardless of your personal feelings on whether a person should get death, life—do you understand first off in a murder ,case that a person cannot receive the death [2134] penalty?

A Right.

Q The range of penalty is broad as for any offense under the law. I think the reason it is that broad is because the law allows you to take into consideration, you and the other jurors, the infinite number of circumstances under which one person could knowingly, as the law says, or intentionally cause the death of another individual. Now, I want you to bear in mind that we're not talking about a murder where someone acted in self-defense or was crazy or insane or a crime of passion or an accident because those aren't murders. If you believe that, that wouldn't be murder. In other words, you wouldn't set a low penalty because you thought someone acted in self-defense. If you thought someone acted in self-defense, you would find them not guilty?

A Right.

Q Do you see what I'm getting at?

A Uh-huh.

Q We're talking about murder. You know as well as I do—we've both lived long enough to know that one person can kill another [2135] person for all different reasons?

A Right.

Q They may not be legal reasons, but they run the gamut, don't they?

A Right.

Q All murders involve the loss of life, but the law says obviously some are worse than others?

A Yes.

Q All the law says is this, and I think you can do this: All the expects of a juror in a murder case, number one, is to keep an open mind, follow the law and just tell us you will wait and listen to all of the evidence, wait until all of the facts are in before you make a decision. You're not going to jump to any judgment or anything like that. You haven't heard any facts in a murder case, have you?

A No.

Q No one is going to force you into any particular position, but the law simply says this: To be qualified, you have to say I'll have an open mind and whatever the law is, I'll follow it whether I agree with it or I [2136] don't agree with it. The law says you wait until you hear all of the evidence and if you hear a fact situation for murder—and no one is expecting you to think of a particular fact situation, but when you feel it is proper based on the evidence once you hear it that calls for, under the law—you see provided for by law—you can assess the punishment, as the old cliche goes, to fit the crime. In other words, you decide it after you hear the evidence. Do you see what I'm getting at?

A Uh-huh.

Q In other words, if you hear a case—let's imagine you're on a jury. After all the evidence is in, you hear a case,

to your way of thinking after you've heard the evidence, calls for, warrants and justifies the minimum, whatever that may be, you will give the minimum?

A Right.

Q On the other hand, if you hear a case of murder that calls for and warrants and justifies and it's the right thing to do to give the maximum, you will give the maximum whatever that is?

[2137] A Yes.

Q Can you do that?

A Yes.

Q Even though you may not want to give the minimum or you may not, as you sit there now, be inclined to give the minimum, you don't know, do you?

A No.

Q Why?

A Because you haven't heard the facts yet.

Q That's right. That's all the law expects, to keep an open mind and wait until you bear all the evidence. In other words—you see, the range of penalty for murder is from five years in the Texas Department of Corrections up to ninety-nine years or life and you can even add on an option of a $10,000.00 fine. I gather from what you've said you are the type of person who has an open mind?

A Yes.

Q You have told us that you will follow the law and you will wait, if you're on a murder case and called to make that decision, until you've heard all of the evidence?

[2138] A Yes.

Q If you hear a case, to your way of thinking calls for and warrants and justifies five years, you'll give it?

A Yes.

Q Even though it may be a rare case. Do you see what I'm getting at?

A Yes.

Q The same thing would hold true for the maximum. If you hear a case that calls for and warrants and justifies—you know, the facts call for it—a ninety-nine year or life sentence and a $10,000.00 fine, you will do that because the law and the facts call for it?

A Yes.

Q You understand that it may be difficult and the law presumes that it might be difficult to give the maximum. You're going to have to hear special facts before you would give someone ninety-nine years or life?

A Right.

Q The same thing would hold true for the minimum. You would have to hear special facts to satisfy you that the minimum was deserved, to give five years. If you do hear [2139] those facts, you will give five years, won't you?

A Yes.

Q Or anywhere in between?

A Uh-huh.

Q I think I'm out of time, Ms. Weiner.

MR. MACALUSO: Is that correct, Judge?

THE COURT: Yes. You're over time.

Q Let me just ask you one question, Ms. Weiner. I notice that you have some relatives that are in police work?

A Yes.

Q You understand, when the Judge went over this the other day, that you judge all witnesses by the same yardstick. In other words, it doesn't matter whether a witness is a police officer, a psychiatrist or a skid—row bum, you apply the same yardstick in deciding how much or how little you wish to believe. You wouldn't automatically believe a police officer before be gets on the stand because you say police offices always tell the truth. You

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[2158] from what we've heard, it appears that you are qualified well, as we get what you've seen on TV out of your mine.

A Right.

Q You say your son was ten years old at the time he was arrested?

A Yes.

Q In other words, be was not handled down here. It was out at the juvenile home. Was it at the juvenile home?

A No. It was downtown. We had to pick him up down there. We lived in Richardson, but he was at K-Mart in Dallas so he was taken to the Dallas police station.

Q You indicated that you do believe in the death penalty, but you don't know why. You just do.

A Yes.

Q In other words, some people say that is the maximum and I think that it deters—I think it may prevent other people or something like that, a million number of reasons. Then there are some people like yourself who say I believe in it and I just don't know why, but I do and I've always felt

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[2242] RONALD P. SALSINI,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Salsini. Let me begin by reintroducing every one here. I'm Paul Macaluso and this is Jim Nelson and once the trial begins, we will be joined by Norman Kinne. We are all assistant criminal district attorneys here in Dallas and we're representing the State of Texas in this particular case.

Now, to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Salsini?

Q To Mr. Cunningham's immediate left is Mr. Royce West.

MR. WEST: Mr. Salsini, how are you doing, sir?

Q As you may recall from the introductions yesterday, they are the defense attorneys who have been appointed by Judge

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[2246] you or anything like that. Just tell us how you feel and you will be doing your job and, if we ask the right questions, we'll be doing our job.

Now, if you have a question, by all means ask it because there is a lot of stuff we're going to be throwing at you and things we're going to be talking about. If I'm not making myself clear at any time, by all means top me and let me slow down, whatever the case may be. No one is going, like I said, to talk you into or try to talk you out of a position at all. Just tell us how you feel. If there is something that you need to tell us, whether we cover it or not, by all means, just in fairness to both sides, let us know what it is.

Now, let me tell you what our position is in this case. Just to be fair with you, as we have done with forty-three other jurors that we've talked to, we are actively seeking the death penalty in this particular case for this particular Defendant, Thomas Joe Miller-El. We're not making any bones about it. We know that the law allows for it and we [2247] intend to provide the jury, that meaning you if you're on the jury, with the type and the quality of evidence that would convince you beyond any reasonable doubt whatsoever that Mr. Thomas Joe Miller-El is guilty of capital murder just exactly as he's been charged in this indictment and nothing else.

That's done in the first part of the trial. Then we intend to be able to provide the jury in the second part of the trial, where the penalty is actually determined, once again with the type and the quality of evidence that would convince them beyond any reasonable doubt that those three questions should be answered yes. You know the effect of all yes answers is a mandatory sentence of death by lethal injection.

Now, that's just our position. Obviously it depends on the evidence and depends on the decision made by the jury, but I want you to know, like we let the other jurors know, just exactly what we're trying to prove and we intend to prove during the course of this trial and what the law allows under a certain type of evidence.

[2248] Now, with those remarks aside, like I said, you're the one whose opinion is the most valuable here this afternoon. We want to know how you feel. Let me just ask you. know you were asked this question fifty—six, how you feel about the death penalty, but you only had a few minutes to answer it and a few minutes to think about it. In your own words, why don't you just tell us how you feel about the death penalty generally speaking and your ability to actually serve on this kind of a jury?

A I was thinking about it as we talked about it yesterday and I've been thinking about it since we left there. I believe in the death penalty because it is a good deterrent and everything—the only deterrent for a crime like that. As far as—is it my decision as far as on a jury, I think I could make the decision, but I would really have to think about it long and hard before I could make that decision.

Q Sure. Naturally, given the magnitude of any decision in this type of case, anyone would expect you to consider the

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[2251] see what I'm getting at? That would be one thing. If it would just be a difficult situation, then that wouldn't be a reason. Do you see what I'm getting at?

A Uh-huh,

Q Allowing that anybody serving on this type of case would take it serious—at least I hope they would. I would.

A Right.

Q Are you saying that you just would evaluate the evidence carefully or are you saying that there might be a situation arise where you, in all honesty, feel that the magnitude of the situation is such where your personal feelings about making a mistake or whatever it might be might bother you for the rest of your life?

A I think I could make the decision, you know, come up with it, but I think it would be more of I would be forced into that position. I wouldn't be happy with it, but I could do it. I don't think I would be pleased with it. Even if there was no doubt or anything, I think I might have a problem with it in the future.

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[2270] Q One or more no answers, life?

A Right.

Q Let's shift our thinking for just one second away from automatic life or death and let's talk about a situation that I'm not suggestion will occur in this particular case, sir, but I want to talk to you about it briefly. That's a situation where, once again, you're on capital murder. Let's say murder during a burglary. That's one type. You're convinced beyond a reasonable doubt as to whether it occurred during a burglary. You don't hear any testimony about a burglary. We have to prove both if we expect you to find him guilty of capital murder, don't we?

A Yes.

Q We didn't do that, did we?

A Right.

Q So you found him not guilty of capital murder and you found him guilty of what we did prove to you, which is what?

A Murder.

[2271] Q If that happens, if that really happened, murder has a totally different range of penalty. It is no longer mandatory life or death. It is as broad as any punishment under the law, five years to ninety-nine years or life. The legislature has set that range of punishment broad enough so you, as a juror and the eleven other jurors, can encompass—you can tailor a punishment based on the infinite number of circumstances, backgrounds and relationships where one person ends up murdering another person. We all know that all murders are bad, where one person knowingly or intentionally causes the death of another person without any legal excuse or legal justification, but there may be a myriad of nonlegal reasons, mitigation let's say, why one person murders another person.

The law simply says to be qualified as a juror all you have to do is tell us—and I think you can do this, Mr. Salsini—one, that you will follow the law; two, that you will keep an open mind and wait until you've heard all of the evidence so you can make a decision and then you will simply [2272] tailor the punishment to fit the crime within the limits of the law. Can you do that?

A Yes.

Q In other words, if you heard a case that you felt—no one is committing you right now. Whether you can think of one or not, it doesn't matter. Just tell us that you are an open-minded individual and you will follow the law and if you do hear a case, after you've heard the evidence, to your way of thinking calls for, warrants, or justifies the minimum—and you know the minimum is five years—you will give five years.

A Right.

Q By the same token, if you hear a case, where the facts and circumstances in a murder case calls for, warrants and justifies the maximum—and you do know what the maximum is, ninety-nine years or life and a $10,000.00 fine—you would give that?

A Yes.

Q The cases may be few and far between that you would give five years or ninety—nine years or life, but you just tell us that you will wait until you hear the evidence [2273] and if you feel that it's proper, you will give it after you've heard the evidence, either one or the other or anywhere in between?

A Right.

Q Any problem with that at all?

A No.

Q Two very short things here and then I'll let the other lawyers talk to you. You understand what the Judge said about a conviction on the testimony of one eyewitness? There may, in many instances, like when your home got robbed, be only one eyewitness to that offense or a lady is raped or whatever the case may be. The law says that a conviction can be based on just one eyewitness if you believe the eyewitness is capable of testifying as to the actual events. Do you see what I'm getting at?

A Yes.

Q The question to you, sir, is, could you base a conviction in a capital murder case or a murder case, for that matter, on the testimony of one eyewitness if you believed the eyewitness beyond a reasonable doubt?

A With no other evidence at all?

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[2304] MARIE H. MAZZA,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Marie, I'm Paul Macaluso and this is Jim Nelson. When the trial itself actually begins, ma'am, we will be joined by Norman Kinne. He's not here, of course, right now, but he's another assistant district attorney like you and I. He will actually be presenting the evidence to the jury once it begins, the trial itself begins.

Now, to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: Good morning. How are you?

Q To Mr. Cunningham's immediate left is Mr. Royce West.

MR. WEST: Good morning.

Q You may recall that they are the defense attorneys who have been appointed by the Court to represent the Defendant. He's

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[2308] us know and we'll repeat it, rephrase it, slow down or whatever it is. We kind of get running pretty fast at times.

As you well know, you are a prospective juror on this case and we're trying to find twelve—well, we have three now, maybe only two. One has an illness problem or a health problem and we're a long way from that. We're trying to find the twelve people we feel would be the most fair, both sides would agree would be the most fair and qualified and suited to serve on this kind of a case.

Let me just tell you what our position is so you will understand where we stand at the outset. Just in fairness to you as we've told the other prospective jurors that we've talked to, Marie, we're actively seeking the death penalty in this case for Thomas Joe Miller-El. We're not making any

apologies for it. We know that the law allows for it in these types of cases and we intend to be able to provide this jury with the type and quality of evidence that we feel would convince them beyond any reasonable doubt whatsoever that [2309] Thomas Joe Miller-El is guilty of capital murder exactly as he has been charged. Then in the second part of the trial, once again, to provide the jury with the type and quality of evidence that would convince them that these questions—two on this board and the third over there—should be answered yes.

As you know, the result of three yes answers or all yes answers is a mandatory sentence of death. Basically that's what we're seeking based on the evidence that we intend to offer during the course of this trial. The only reason I tell you that, Marie, is to just let you know what our position is and what we intend and hope to be able to prove to this jury so that it wouldn't come as any surprise to anybody where we stand somewhere down the line. As you well know having been a juror before, it's up to the jury to decide those questions, you know, but we want you to know where we stand.

Now, you've been asked and given precious little time to respond the other day to these questions, the sixty or so different things there to consider. You were asked your [2310] feelings about the death penalty with a few minutes to reflect on it, of course. Now, you've had two or three days. Let me just ask you, Marie, to share with us in your own words bow you feel about the death penalty, you know, capital punishment generally speaking and then whether or not you feel you could actually serve on this type of a case or are suited to serve on this type of a case?

A The question has never ever entered my mind before the other day. You know, you hear about things, the different cases and such and people going to—you know, as death being the result. I guess I have never ever realized that that

could ever be asked of me, to make that determination. In those other cases, I feel the citizens, my fellow citizens, have had to make that decision. It's not an easy one and I feel that it depends upon the case, the testimony. They have to go from everything to make that decision. The choice they made was unanimously that they felt strongly that this was the decision that they felt they needed to make. It's kind of hard determining somebody's life, [2311] whether they live or die, but I feel that is something that is accepted in our courts now and it is something that—a decision that I think I could make one way or the other.

Q You more or less feel it is a responsibility just like the other type of jury service you were on? No one would disagree with you if you feel that it would be a weighty decision because obviously it would be a very weighty decision, a very, very important decision. Knowing yourself as you do, Marie, do you feel, if called upon and presented the type of facts, that you could make that decision that would ultimately result in the execution of Mr. Miller-El under the law?

A It's difficult, I know—and I've had two days to think about it. Toying with my religious upbringing, my family upbringing and such, it depends upon bow I feel that the testimony was presented to me and that would be something that I would feel like I could do. It's difficult.

Q Let me ask you. You mentioned your religious feelings and other factors that you've thought about for the last couple of

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[2327] problem.

Q Let's shift gears here, Marie, because we don't have a lot of time left and I want to cover something with you that I talked about earlier. I'm not suggesting that this would occur, but it is something that I do have to cover with you. Imagine for a moment that you're on a hypothetical capital murder

jury. The State has alleged a capital murder that's a murder during a burglary—a murder during a rape. You, along with the other jurors, are convinced beyond any reasonable doubt that a murder occurred. There's no doubt about it, but you have a reasonable doubt as to whether or not it occurred during a rape, or there was any testimony about a rape. You're just not convinced. You understand that you couldn't find that defendant guilty of capital murder because we didn't prove both parts, did we?

A No.

Q We just proved the murder by itself, so you would have to find him not guilty of capital murder and find him guilty of what we did prove, which was what, murder. If that were to happen, you just divorce any [2328] thinking about mandatory life or death because that is not even a possibility, as I said earlier, for murder.

Now, we all know obviously that any kind of murder is a serious offense, but the law allows you in this particular situation where you've convicted somebody of murder the broadest of all ranges of penalty for any offense under the laws of the State of Texas, and the lowest range all the way to the highest. I think the reason, everyone will agree, is that it allows you to tailor the facts—you, as a juror, to tailor the punishment to the facts once you hear the facts. Remember the old cliche, tailor the punishment or make the punishment fit the crime? The law allows you to do that. Marie, I think we've all lived long enough to know that there is a myriad, an infinite number, of circumstances under which one person can commit murder, kill another person. All bad, but some are worse, right? Would you agree with me on that?

A Yes.

Q All the law expects for you to be [2329] a qualified juror on a murder case is this—and I think you are this type of person: Number one, you are the type of person who will follow the law, respect the law and will follow it; number

two, you're an open—minded person because you've said a number of times you would have to hear the facts in the case, wouldn't you?

A Yes.

Q And you're not going to jump to any conclusions or anything like that, are you?

A No.

Q That's all the law expects of you to be a qualified juror, is say I've got an open mind because I'm an open-minded person and I will follow the law, whatever it is, whether I agree with it or disagree with it, and I will wait until I've heard all the evidence and then I'll make a decision. The facts that I hear, if I think they're proper and called for and warrant and justify a minimum sentence, I'll give the minimum. If the facts call for, warrant and justify, after I've heard them, the maxir..m, I'll give the maximum. Can you do that, Marie?

[2330] A I think I can.

Q Okay. No one is suggesting that the minimum would be an easy thing to do or the maximum would be an easy thing to do. I'd like to think that it would take pretty unusual facts to give either one of them, you know real severe or real mitigated. But when they're called for, you could do that, I gather?

A Yes.

Q You know the range of penalty for murder is not less than five years in the Texas Department of Corrections nor more than ninety-nine years or life and an optional $10,000.00 fine and anywhere in between. I gather from what you're saying, Marie, just as you could consider the full range of penalty in that last case you were on, you could consider, in a proper case—and that's when you decide it's proper—after you've heard the facts, if you felt it was proper and warranted it and justified it, you could return a verdict of five years for murder, I gather?

A Yes.

Q Even though you understand that murder is where one person knowingly and [2331] intentionally causes the death, under a wide variety of circumstances you understand, of another individual, but there is no technical or no legal justification, so don't be thinking about self-defense or accident or anything like that, if you believe that someone knowingly and intentionally killed someone. You get to hear all the circumstances surrounding that before you make a decision.

The same thing would hold true for the upper range. If you heard a case that called for, warranted and justified ninety—nine years or life and a $10,000.00 fine, could you do that as well, if you felt it was proper?

A Yes.

Q In other words, you would just wait and hear all the facts, wouldn't you?

A Correct.

Q One or two other things here and then I'll let the other lawyers talk to you, Marie. Remember that the Judge talked to you about the testimony of one eyewitness to any offense? The law requires that the State, having the burden of proof as we do—there's no question about that. We have every thing to

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[2345] CHATTA J. NIX,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. Nix. I want to reintroduce everybody to start things off. My name is Jim Nelson. The

man seated next to me is Paul Macaluso. There is one other lawyer that will be involved in this who isn't here today and his name is Norman Kinne. He will be presenting the evidence for us. Mr. Kinne and Mr. Macaluso and myself are assistant district attorneys here in Dallas. We've been assigned by Henry Wade, the elected district attorney to handle this case for the State of Texas.

Seated immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good morning, Ms. Nix.

Q Next to him is Mr. Royce West.

MR. WEST: Mr. Nix, good morning.

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[2348] right or wrong answers and answer the questions just as best you can, that would sure help us a great deal.

Now, Ms. Nix, I feel it is only fair to you that we tell you going in what our position is. We, meaning Mr. Kinne, Mr. Macaluso and myself representing the State of Texas, are actively seeking the death penalty for that man right down there, Thomas Joe Miller-El. We feel like we will be able to present to a jury, twelve people, the type and the quantity of evidence which will convince them to find him guilty of capital murder and the type and quality of evidence that will convince them to answer those three questions there on the boards yes.

If each of those questions is answered yes, that results in Judge McDowell assessing the death sentence in this case, no options, no considerations, no going back. That's how it works. We'll talk to you a little more about that as I go on here, but that's our position. We're actively seeking the death penalty and we will continue to do so throughout the trial with the anticipation that [2349] those questions will be answered yes, the Judge will sentence this Defendant to death, he will be executed down in Huntsville, Texas.

Now, you had a chance yesterday to fill out a questionnaire —Monday I guess it was—and you didn't have a whole lot of time. We were moving you in and out of the courtroom and had you running around a little bit and you didn't have a whole lot of time to think about it. There was one question on there about your feelings about the death penalty. You answered it fairly completely, but you've bad a couple of days to sleep on it and think about it some more, I would guess. I'm going to ask you, if you would, just in your own words, to tell us how you feel about the death penalty and whether you feel it serves a purpose in our society?

A Well, I do believe in the death penalty. I wouldn't want to use it just haphazardly or just for the sake—just because we can or because it is allowable. I believe—in my own personal mind I make a distinction between what murder is and what the taking of a life can be. I don't know if the

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[2367] and if we prove to you that he's guilty of capital murder, we're going to ask you to find him guilty. If we haven't done that, whether he testifies or they put on any evidence or not, if we haven't done that, it's your duty to find him not guilty?

A Right.

Q By the same token, if we prove to you that those questions should be answered yes, we're going to ask you to answer them yes and if we haven't, again even if you haven't heard a peep out of the defense, if we haven't proved those to you, we're going to ask you to answer one or more of them no, whichever ones we haven't proved. Are you with me up to this point?

A Yes, sir.

Q I get to talking kind of fast sometimes and I know I'm throwing a lot of stuff at you. I want to law school for three

years and still understand about three-fourths of this, so I just want to be sure we're clear on it.

Now, one other thing that may come up and we don't anticipate it will in this [2368] case, but we need to talk about it now. I told you what we have in this case is what we call murder plus. Now, the death penalty is only appropriate in Texas for the offense of capital murder. If we proved to you that a defendant knowingly or intentionally caused the death of another individual without any legal justification or excuse, but we failed to prove to you that it was in the course of committing a robbery or in the course of committing any other offense, then we haven't proved to you capital murder, have we?

A Right.

Q We've just proved murder, Now, in Texas for just murder, there is no death penalty. The range of punishment is anywhere from five years up to ninety—nine years or life and an optional fine of up to $10,000.00. Now, when we talk about murder in Texas, Ms. Nix, you hear in other states, on TV, or whatever, about first, second or third degree murder and that kind of thing. In Texas we have murder and that's the knowing or intentional taking of another human life without any legal justification or excuse. We aren't talking [2369] about self—defense because, if self—defense is found in a case, the person is not guilty of murder. It's justified. If it is an accident, the person is not guilty of murder or, if it is reckless, he may be guilty of involuntary manslaughter or something, but again it's not murder. If the person is insane at the time, he's not guilty of murder. If it is a killing in the heat of passion—for example, I have a—

MR. CUNNINGHAM: Your Honor, we will object to him giving any type of factual situation to indicate an involuntary or voluntary manslaughter.

THE COURT: I'll overrule that. You're describing voluntary manslaughter?

Q I just wanted to describe—if something happened to my little girl and I was so enraged about what happened and I found the person that did it and they were laughing about it and I went and killed the person, that might be under the heat of passion, what we call the immediate influence of sudden passion arising [2370] from an adequate cause. That's not murder. That's voluntary manslaughter. When we talk about murder, we're talking about the knowing or intentional killing of another human being without any of those legal justifications or excuses.

Again, the range of punishment for that, if you find that, is anywhere from five years up to ninety-nine years or life and a fine of up to $10,000.00. Would you agree with me, Ms. Nix, that there is a myriad of circumstances under which one person could kill another person, all kinds of surrounding facts and circumstances could come into that, and the jury would be allowed to consider the surrounding facts and circumstances, not legal defenses, but the surrounding facts and circumstances.

The legislature has made that very wide range of punishment so all those things can be considered. In order for you to be qualified to serve on the jury, you have to be able to tell us that you can consider and assess, in a proper case, the entire range of punishment. You don't even have to be able to [2071] sit there right now and think of a situation where you would give life for murder. You don't have to be able to sit there and think of a set of facts and circumstances where you would give five years for the offense of murder. What we have to know from you, Ms. Nix, is if, after you've heard all the facts and circumstances of the case—you've convicted a person of the offense of murder, the knowingly or intentionally killing of another individual without any legal justification or excuse, after you've heard all of that and you've

heard everything you're going to hear on the case, all the facts on the punishment phase, also, if you believed a life sentence is called for by the evidence and warranted by the evidence in your own mind, could you give a life sentence?

A Yes, sir.

Q By the same token down at the other end, again, after you heard all of the facts and circumstances and a person is convicted beyond a reasonable doubt of murder, you've heard everything you're going to hear, if you're convinced in your own mind that a [2372] five year sentence is appropriate, could you give it?

A Yes, sir.

Q Okay. All we're asking you to do is keep an open mind as to all the evidence and listen to everything before you make a decision. If after you've heard all the facts and circumstances, they call for five years, you cannot only consider that, but you can give it?

A Yes, sir.

Q If it calls for life, you could do that or anywhere in between, twenty-three and a half years, sixty-seven years or whatever it may be, you will give whatever is justified in that range of punishment?

A Yes, sir.

Q You haven't closed your mind to one end or the other or anything in between; is that right?

A Right.

Q Do you have any problem with that at all?

A No, sir.

Q A couple of other things just to

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[2379] A Right.

Q What is that?

A It's a general contract construction company.

Q Are you Nix?

A My brother is.

Q Speaking of your brother, you indicated on your data sheet that be was on trial in the I-30?

A They messed up on the indictment and reindicted him yesterday instead of the trial and he made a plea bargain so it's not going to trial.

Is that going to affect you in any manner in this particular case?

A Not that I—

Q I mean, are you going to be concentrating on that?

A No, sir.

Q Are you going to be a potential witness in that case?

A No, sir. It's over for him as far as I know.

Q Were you going to be?

A No, sir.

[2380] Q Have you been interviewed by the U.S. Attorney's office?

A No, sir.

Q Have your brother's attorneys or anything like that?

A No, sir. His attorney—I've also been charged with a conspiracy case on another thing and his attorney is my attorney so I have met him and talked to him and I know him.

Q So you have been indicted?

A I haven't been indicted. I've been—a lawsuit has been filed.

Q Is it criminal or civil?

A It's civil, I'm pretty sure.

Q Who filed it?

A I don't even know. Oh, I do, too, FSLIC filed it against me and thousands of others.

Q Who is your attorney?

A Vincent Perini.

Q Does that grow out of the I-30?

A Yes, sir.

Q And Vincent Perini is also your brother's attorney?

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[2399] MR. NELSON: Your Honor, the State would be pleased to accept Ms. Nix as a juror in this case.

MR. WEST: Your Honor, we would exercise a strike.

THE COURT: Thank you, Mr. West. Ms. Nix, you will be excused from service in this case. Off the record, Pam.

(Whereupon, there was an off—the—record discussion, after which the following proceedings were held.)

MR. NELSON: Judge, the State would like to put into the record for record purposes that juror number fifty, Vergie Miller, has been excused by agreement and she is, in fact, a black female that has been excused by agreement.

MR. CUNNINGHAM: In response to that, Your Honor, our objections with respect to blacks that have been struck have been

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[2408] MARY J. WITT,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Ms. Witt. How are you doing this morning?

A Fine.

Q Let me begin by reintroducing every one here or most everybody. You may recall that I'm Paul Macaluso and this is Jim Nelson and once the trial itself begins, we'll be joined by another assistant district attorney who is not here now, but his name is Norman Kinne. We are assistant criminal district attorneys here in Dallas and our boss is Henry Wade and is has designated us to represent the State of Texas in this particular case.

Now, to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are you this morning, Ms. Witt?

* * * *

[2412] talking about and there are no right answers, either, unless you say that a right answer would simply be what is honestly on your mind and how you honestly feel. If we ask the right questions and you're open and honest with us, as I'm sure you will be, then you will be doing your job and so will we.

Now, let me explain that no one is going to argue with you or quarrel with you or play lawyer with you and try to talk you into or out of anything. Whatever is on your mind, just let us know, all right. If you have a question, don't hesitate to ask that question. If you have something that you would like to tell us that we don't touch on and you feel that it is important or that we might think it is important, then by all means let us know.

Now, let me tell you where we stand on this case, the State of Texas, Mr. Kinne, Mr. Nelson and myself. We are actively seeking the death penalty in this case for Thomas Joe Miller-El. We make no bones about it, Ms. Witt. We know that the law allows for the death penalty in this type of a case and we intend to be able to provide this jury, once it [2413] is selected, with the type and the quality of evidence that will convince the jury, all twelve of them, beyond any reasonable doubt that Mr. Thomas Joe Miller-El is guilty of capital murder just exactly as he is charged in this indictment. That's done in the first part of a criminal trial, as you may know.

The second part of the trial where the penalty or punishment is determined, we once again intend to be able to provide the jury with both the type and the quality of evidence that we feel will convince the jury beyond any

reasonable doubt that these questions, all of them, should be answered yes which, as you may recall from the remarks of the Judge the other day, results in a mandatory sentence of death for the Defendant. Now, that's our position. Ultimately, of course, it's the position and the decisions made by the jury that controls, but we feel it only fair that we tell you, along with the other fifty or so others that we've talked to, exactly where we stand at the outset of the trial.

Now, with those remarks and those things out of the way, Ms. Witt, like I said [2414] earlier, you're the most important person here this morning and your opinions are the most important. Let me just ask you—although we know you've answered or were given an opportunity to talk about certain things on the questionnaire, now that you've had three or foui days to sleep on it and think about it, let me just ask you if you would share with all of us here your personal feelings on the death penalty and your ability to serve and actually make a decision in a case of this type as a juror?

A I believe in the death penalty depending on the circumstances, of course. But if it's just a love quarrel or somebody has a momentary insanity, then I may not vote for it at that time, It would depend on the circumstances.

Q What you said is consistent with what the law is and we'll talk about it more a little bit later as it concerns a capital murder. You said it depends on the facts and it depends on the circumstances. None of which you've heard to this point; is that correct?

A Correct.

* * * *

[2435] the dynamics, all of the details of an offense? Do you feel you could learn enough about an individual when you learn all the roles that he played in it, a crime of this magnitude, that could tell you beyond a reasonable doubt, yeah, this is the type of person who probably would commit some criminal act of violence in the future? DO you think

you could do that?

A Yes.

Q The third question that you see there is a question that you may receive or you may not receive. It depends on the type of evidence. It's conditional. Basically what that asks you to decide is, was this a provoked killing or an unprovoked killing and you would answer it accordingly.

Now, let's shift gears here just for a second. I've got precious little time and I've got a couple of important things—other important things. Let me put it that way. I talked to you earlier about the distinction between murder and capital murder. I'm not suggesting that this would ever occur, Ms. Witt, but we have to allow for the possibility and just discuss it with you now.

[2436] Once again suppose that you're on a jury. It's a capital murder that we've alleged in that indictment, a murder during a burglary. That's a type of capital murder. You, along with the other jurors at the conclusion of the trial, are convinced beyond any reasonable doubt that the Defendant committed the murder. You didn't have any doubt about it at all, but you didn't hear any testimony about a burglary or you have a reasonable doubt about it. Do you understand in a situation like that, the State had not met its burden of proof for a capital murder. We didn't prove both components, did we? We proved the murder, but we didn't prove the other component which makes it a capital murder, and that was the burglary. The law is very clear what you have to do then, You have to find the Defendant not guilty of capital murder and find him guilty instead of what we did prove, which was what?

A Murder.

Q Right. If that happens or were to happen, in any case, you just forget about mandatory life or death because those aren't [2437] options for murder, as we discussed earlier. The

range of penalty for murder is as broad as it is for any offense under the law. I like to think and the other lawyers agree that it's as broad as it is because the law does take into account and allows a juror properly to take into account, in deciding what the penalty ought to be for a murder, the infinite number and variety of circumstances under which one person can knowingly or intentionally cause the death of another that would be legally murder. Do you see what I'm getting at?

A Yes.

Q Now, all the law expects of you to be qualified as a juror on a murder case is really pretty simple. Number one, it is to follow the law in that range of penalty that we'll talk about in just a minute and, most importantly, to keep an open mind, In other words, if you can tell us that, even though you have not heard any evidence in a murder case, you will follow the law with regard to the range of penalty whatever it is. Then once you've heard all the evidence in the murder case, I mean all of the background, all of the [2438] relationships between the parties, the victim and the Defendant, and so forth and so on, then and only then, after keeping an open mind until you've heard all of the evidence, you'll make up your mind on the facts and not before, not prejudge anything, Can you do that?

A Yes.

Q In other words, if you heard a murder case—and no one is going to argue. Murder is bad. Some are worse. If you heard a murder case, after hearing all the facts of the case, that you feel the minimum is called for, warranted and justified—in other words, if the right thing to do is to give the minimum under these facts, after you hear them, you'll give the minimum whatever it is. Can you do that?

A Yes.

Q If you hear a fact situation, on the other hand, that calls for the maximum and you think, under those facts, that the right thing to do, the justified thing, and the proper thing to do after you've heard the evidence, is to give the

maximum, you'll give that? Can you do that?

[2439] A Yes.

Q Allowing that the range of penalty for murder is as low as five years in the Texas Department of Corrections all the way on up to ninety-nine years or life and an optional $10,000.00 fine, could you, if the facts and circumstances warranted it in the proper case, consider and actually vote for a sentence of five years for murder, if you thought it was proper?

A Yes.

Q On the other hand, if you thought the case deserved ninety-nine years or life, you could give that as well, and a $10,000.00 fine or anywhere in between?

A Yes,

Q Now, a couple of quick matters here. Remember what the Judge said? Motive and premeditation—be may have said this on Monday and he may have not. Motive and premeditation are not two requirements of the State in either a murder or a capital murder case. In other words, we don't have to prove, because we may not be able to prove, what motivates one person to kill another or if

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[2518] LETA GIRARD,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon Ms. Girard. As you may remember from this morning, my name is Jim Nelson. I'm an assistant district attorney here in Dallas. The lawyer sitting next to me will be back in just a moment. His name is Paul Macaluso and the third gentlemen who will be joining us at the time we

actually start evidence in this trial is Mr. Norman Kinne. The three of us are assistant district attorneys here in Dallas. We've been assigned by Henry Wade, your elected district attorney, to handle this case for the State of Texas.

Mr. E. Brice Cunningham is the gentleman immediately to my left.

MR CUNNINGHAM: How areyou, Ms. Girard?

MS. GIRARD: Just fine.

Q And Royce West is next to him.

* * * *

[2520] feelings by not being concerned by what thirty-nine or forty people are thinking about what you're talking about. I know it's difficult with you up here on the witness stand and us out here, but I'd like you to try to relax as much as you can.

Understand that there are no right or wrong answers to anything I'm going to ask you or anyone else is going to ask you. We're just trying to find out how you feel about things. If you will just be as honest and as open as you can—I'll have to ask you some questions that are maybe rather pointed at times and I'm not trying to make you uncomfortable because that's the last thing I want, I'm don't want to even try to argue with you, but I am going to try to find out bow you feel about some things.

With that introduction, let me just basically tell you what our position is. When I say we, I mean the three of us representing the State of Texas. We are actively seeking the death penalty for Thomas Joe Miller-El. We feel like we will be able to present to the jurors in this case sufficient [2521] type and quantity of evidence to have them convict Thomas Joe Miller-El of the offense of capital murder and also the type and quantity of evidence that will allow a jury to answer

those three questions yes, be convinced that those should be answered yes beyond a reasonable doubt. If those three questions are answered yes, Thomas Joe Miller-El receives the death penalty and we anticipate that, if he receives that death penalty, he will be executed at some point.

Now, I tell you that because I feel like it is only fair that you know where we are and what our position is in this thing, but ultimately our position doesn't make that much difference. What counts is the position of you and the other jurors in this case. You filled out that questionnaire this morning. Most people that come down here, if they think about it at all, think maybe I'll be on a civil case or I'll be on a little theft case or something like that and you walk in and sit down and the Judge says this is a capital murder and I guess it would be a little bit of a shock. We asked you to fill these [2522] questionnaires out on pretty short notice. There is. one question on there about the death penalty. I notice from looking at yours, you didn't answer it. You've had at least a little bit of time to think about it over lunch. Can I just ask you to tell us in your own words how you feel about the death penalty and whether you feel like you could serve on a jury in this type of case?

A Well, I'm really not sure how I feel about the death penalty. The way I feel sometimes is—

MR. CUNNINGHAM: Your Honor, we can't hear.

A To me, living sometimes is a worse—is worse to me than dying would be, so I'm not sure. I'm not saying I couldn't do it, but that's bow I feel, I'm just not real sure.

Q Do you feel like the death penalty serves a purpose in our society?

A I'm sure it does.

Q Evidently, from your answers, you've not given this a whole lot of thought before; is that right?

A No.

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[2580] CLARA A. EVANS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Ms. Evans. Can you hear me all right?

A Yes.

Q I'll try and keep my voice up and not talk too fast, but if I don't, if I start going too fast, just slow me down, all right?

A Okay.

Q Let me reintroduce myself, I'm Paul Macaluso. This is Jim Nelson and we will be joined by another lawyer. His name is Norman Kinne. We're all assistant district attorneys and we work for Henry Wade. I'm sure you know that he's the district attorney here in Dallas. We're the lawyers representing the State of Texas in this case.

Now, to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are

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[2584] A That may be difficult. This is an issue I have avoided, the capital punishment issue.

Q We're going to talk about it in just a little bit here and just tell us how you feel. I've got some idea of how you feel. I know you feel very strongly about that. That's not ususual.

You are juror number fifty-nine. We've talked to many, many people in selecting this jury or trying to select it. We only have three jurors at this time that are qualified. I think you can see that the predominant reason why we only have

three jurors out of the significant number that we've talked to is because of the strong feeling that people have one way or the other about the death penalty. That's why the law gives us this added time and this kind of semi-private atmosphere to talk to you about it. We want to know just how you fee.

Now, let me tall you what our position is just in fairness to you, okay?

A Okay.

[2585] Q Now, this is the same thing we've told each and every other juror that we've talked to. Ms. Evans, the State of Texas, the lawyers over here, are actively seeking the death penalty for Thomas Joe Miller-El. We intend to do that throughout the trial. By that I mean, we intend to be able to provide a jury, once it is selected, with the type of evidence and the quality of evidence that will convince them beyond a reasonable doubt that Thomas Joe Miller-El is guilty of the offense of capital murder just exactly as he is charged in this indictment beyond any reasonable doubt. That's done in the first part of the trial, the decision as to guilt or innocence.

Then in the second part of the trial where the issue of penalty is actually determined by the jury, we once again intend to be able to provide the jury with the type and the quality of evidence that will convince them beyond any reasonable doubt that those three questions should be answered yes which, as you know, results automatically in this Defendant be taking down to Huntsville, Texas at some point in time, taken down to death row, [2586] at sometime designated by the law he will be taken to the death house. They will put him on a gurney bed and take him to the death house and put an IV in his arm and inject him with a lethal substance that will cause his death.

Now, Ms. Evans, I'm not saying that to scare you and I'm not saying that to sound morose. I'm just telling you that in fairness as I've told and the other lawyers have told every

juror we've talked to just to bring home the reality of the situation that is at hand here. You know, if you stop to think about it, it's really only being fair to you and all the other jurors. I'm sure this is not something you've been reading about. This is not something you may be talking about philosophically over a cup of coffee or with friends or whatever the case may be. It's not something you've been reading about in the paper or seen on TV. No one wants to put anybody—first of all, no one wants anybody here as a prospective juror such as yourself to be put in a position of compromising any conscientious, religious or moral, strong—felt feelings that you have. Do you see what I'm [2587] getting at?

A Uh-huh.

Q All right. That's why we have this opportunity to talk to you as we're doing now. We just want you to know—you know, we know that the law does allow for capital punishment in Texas. Of course, if the jury finds that the evidence proves it beyond a reasonable doubt, then the questions are answered yes. Do you see what I'm getting at? Three yes answers, that's automatically death. Judge McDowell has absolutely no power under the law or otherwise, so far as I know, to override the jury's verdict. Just the same as if one or more of the questions are answered no, that equals a mandatory life sentence. Do you see what I'm getting at?

A Uh-huh.

Q All right. But whether the Judge agrees or disagrees with the jury's verdict, you know, it really doesn't matter because the law does not allow him to override or to replace your verdict as a juror with his own feelings one way or the other.

I notice here in question fifty-[2588] six, Ms. Evans—and I'm going to let you do some talking now because the lawyers have heard enough of me. I can guarantee you that. You

obviously are opposed to the death penalty and capital punishment?

A Basically, yes.

Q Let me just ask you if you would share with us in your own words—just tell us how you feel in your own words about the death penalty and capital punishment and then your ability or inability to actually serve on a jury of this type and render a decision that you know would result—in other words, three yes answers would result in the execution of Thomas Joe Miller-El right now there. Just tell us how you feel about that and your ability to actually serve on a jury of this type.

A Well, I think that probably the serving on the jury wouldn't be as difficult as the type of sentence would be. I feel I'm a fairly objective person. I feel I can balance and weigh evidence without emotion, but I do value life. I think probably the only time that I would myself be able to live comfortably

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[2651] JERRY W. MOSLEY,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Mr. Mosley.

A Good morning.

Q I want to start out by reintroducing everybody that's here. Again, my name is Jim Nelson. The gentleman sitting next to me is Mr. Paul Macaluso. As I think you were told yesterday morning, a third lawyer will be involved with us for the State. His name is Norman Kinne. Re's not here at the moment. The three of us are all assistant district attorneys

here in Dallas. We've been assigned by Henry Wade, our elected district attorney, to handle this case for the State of Texas.

The man immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good morning, Mr. Mosley.

* * * *

[2654] as open with us as you can. I may seem like I'm trying to pin you down on some things and I'm going to have to because the law requires me to and I'm not doing that to be rude or give you trouble or make things difficult, but I hope you'll bear with me because I'm doing what the law requires that I do.

With that kind of introduction, let me just tell you what our position is on this case. The State of Texas and those of us representing the State of Texas are actively seeking the death penalty for Thomas Joe Miller-El in this case. We feel we will be able to present to a jury the type and quality of evidence to, number one, convince them that he's guilty of the offense of capital murder and, secondly, convince twelve jurors to answer those three questions right there on the boards yes. Mr. Mosley, if those three questions are answered yes, Judge McDowell has no option but to sentence Thomas Joe Miller-El to death. He has no option but to sentence him to die by lethal injection down in Huntsville, Texas. Even if he disagrees with what the jury does, if he doesn't personally feel the death penalty [2655] ought to be enforced or ought to be given in fhis case, if the jury answers those three questions yes, that's it. Thomas Joe Miller-El will be put to death at the time designated by law as a result of that verdict. That's what we are planning to do and that's what we anticipate we will be able to do and we anticipate at some point, the life of Thomas Joe Miller-El, that man right down there, will be taken by the State of Texas as a result of this verdict.

Now, you filled out a questionnaire yesterday and I've basically told you our position, but we need to know are your feelings. One of the questions on the questionnaire yesterday, number fifty-six I think it is, asks you what you think about the death penalty, how you feel about it and whether you have feelings for or against it. You answered that question yesterday and were fairly complete in answering it, but I'm going to ask you, since you've had a night to sleep on it—and I would guess, if I were in your position, I would have done quite a bit more thinking about what I was in for in this kind [2656] of thing. Would you just tell us in your own words how you feel about the death penalty, number one, and, secondly, about your ability to serve on a jury in this type of case?

A Well, I oppose the death penalty actually myself. I think by taking a man's life for whatever reason, that's not right. I'm not saying that he shouldn't be punished, but that's a big step, you know, to take someone's life.

Q Maybe other punishments would be more appropriate than the death penalty?

A I would say so. I'm not against not punishing a man at all for what he's done, but, you know, taking a man's life, you know, with the facts that we have, you—all have or whatever, we, meaning myself—I don't know whether this man is actually did it. I don't know what the circumstances were when he done it. I don't know whether it was a case of self-defense. I don't know whether it was just actually, you know, just outright murder or whatever, so it's hard to determine the future or try to determine the future of a person until you get the facts to know what brought

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[2743] DORIS J. WILLIAMS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Ms. Williams. Let me begin simply by reintroducing everyone here. My name is Paul Macaluso. To my immediate left is Mr. Jim Nelson. Another lawyer who will be joining the State here is Norman Kinne. He's not here, of course, at the moment. The three of us are assistant district attorneys here in Dallas and we work for Henry Wade. We've been designated as the lawyers who will represent the State of Texas in this case.

Now, to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: Good morning, Ms. Williams.

Q I imagine directly, either this morning or when we resume after lunch, he will be joined by Royce West. They are the defense attorneys who were appointed by the Court to

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[2746] talking about and no right answers, either, except true answers. If we ask the right questions and you're as open with us as you can possibly be, we'll be doing our job and so will you. Okay?

Ma'am, if you have a question about anything, by all means ask it. Don't be bashful. If there is something that you need to tell us, whether we get near what it is or whatever, just tell us. It doesn't really matter. You know that no one is going to argue with you or quarrel with you about any personal feelings you have about anything. The whole idea is

for all of us to get a grip on how you feel about some of the things that will come into play if you're a juror on this case.

That's simply what we're about here. We're trying to find twelve people to sit over here and to act as jurors in this case. We're looking for the twelve people that we feel would be the most fair and the most impartial and the best suited and qualified to serve on this type of case. That's why we're going through all of this.

Now, let me tell you what our [2747] position is in this particular case. Ms. Williams, the State of Texas is actively seeking the death penalty. That is, we are actively seeking the death penalty in this case for Mr. Thomas Joe Miller-El. We know that the law allows for it. We intend to be able to provide a jury, once it is actually selected, with the type as well as the quality of evidence that would convince them in the first phase of the trial that the Defendant is guilty of capital murder exactly as he is charged in this indictment. I've got a copy right here.

Then in the second phase of the trial, once again, to provide the jury with the type and quality of evidence that would convince them beyond any reasonable doubt that all three questions or all the questions that determine life or death should be answered yes which, as you know, results in an automatic sentence of death. Do you see what I'm getting at?

A Yes.

Q The reason I'm telling you that is just to be fair to you as we've been to all the other jurors that we've talked to, to more or [2748] less put them on notice or let them know just exactly what our position is or will be based on the evidence. Everyone has a position, but it's really the position of the jury ultimately that will control and make the decision as to life or as to death. Okay?

A Yes.

Q Now, you were given precious little time yesterday to fill out about sixty or so questions. It asked you everything but your hat size and your IQ, I guess. This saves us a bunch of time because we would have to asi you these questions individually otherwise. You can see how much time that would take.

You were asked about your feelings about the death penalty and capital punishment Let me just ask you if you could tell us—you've bad a day or so to sleep on it and think and reflect a little bit more on it. Let me ask you if you would just share with us in you own words how you feel about the death penalty or capital punishment and your ability to actually serve on a jury of this type and render a decision? In your own words, how do you feel about it?

* * * *

[2770] yes. If you decide, on the other hand, that €here was some provocation that the victim did or said something, then you decide whether or not the Defendant acted reasonably or unreasonably. Do you see what I'm getting at?

A Yes.

Q. Just summing it up, you could answer those three questions yes or no depending upon the evidence?

A That's right.

Q There would be nothing automatic about it, would there?

A No.

Q Okay. You look to the State just like in the first part of the trial. You would make the State prove to you that those questions should be answered yes; is that correct?

A That's correct.

Q If we don't, then you answer them no?

A Right.

Q Let's shift gears here for just a second. I know I'm going real fast, but we have a lot to cover, all right? Let's

imagine [2771] again you're sitting on a jury. It's a capital murder case. Let's suppose that in that case the indictment alleges a murder during a burglary. That's a type of capital murder. We would have to prove both the murder as well as the burglary. Let's say you're convinced after bearing all the evidence in the first part of the trial that there was a murder, but let's say you didn't hear any testimony about a burglary or you had a reasonable doubt about the burglary part of it. Do you understand that the State has not met its burden in that example. In other words, if we expect you to find the Defendant guilty of capital murder, we have to prove both the murder and the burglary. We only proved the murder, didn't we?

A Yes.

Q If that were to happen—and I'm not suggesting that it would happen in this case or any other case, for that matter, Ms. Williams, but we need to cover it. The law would expect you under your oath as a juror to find that Defendant not guilty of capital murder because we didn't prove capital murder, did we?

[2772] A No.

Q We proved murder. You found him guilty of what we did prove and that's murder. Remember we said that murder is one level below the offense of capital murder. Now, that is a situation where one person knowingly or intentionally causes the death of another individual. No one is going to quarrel for a moment that any kind of murder is good. They're all bad. It's just that some are worse than others. The law allows you, in a murder case, to take into consideration all of the pertinent and important surrounding circumstances and take those all into consideration basically in allowing you as a juror to tailor the punishment to fit the crime as you decide it once you hear the evidence.

To be a qualified juror on a murder case, basically all we're looking for is the type of juror who can, number one, follow

the law. I -believe you can follow the law whatever that is; is that correct?

A Yes.

Q Number two, that has an open mind and will not prejudge anything, but will [2773] instead say, I'll keep an open mind. I will wait until I've heard the evidence in a murder case, until I've heard all of the facts surrounding a murder and then and only then, after I've heard all of the evidence, if I feel it's proper and warranted and justified to give X number of years, even if it's the minimum, then I'll give the minimum if I feel it's proper to do it. On the other hand, if I hear a fact situation once I've heard the evidence—and, of course, you haven't heard any evidence at all, have you?

A No.

Q But you're the type of person who would keep that oath in mind and will say, I'll wait and listen to the evidence and, if I hear a case that I think calls for, warrants, and justifies the maximum under the law, then I'll give the maximum whatever it is. Any problem with that at all?

A No.

Q Okay. Now, you know that the range of penalty for murder is a sentence of not less than five years in the Texas Department of Corrections all the way up to [2774] ninety-nine years or life and even an optional $10,000.00 fine. I gather from what you've told us, because you are the type of person who will follow the law and keep an open mind, if you hear a fact situation that calls for the minimum and you know that the minimum is a five year sentence and you feel that it's proper after you've heard the evidence, you can return a verdict of five years for murder; is that correct?

A Yes.

Q Just like you could return a verdict of ninety-nine years or life if you felt that was proper?

A Yes.

Q I gather, you haven't closed your mind to a five year sentence or a ninety-nine year sentence?

A No, I have not.

Q You will consider the full range of penalty and willS wait until you've heard the facts so you can make the decision; is that correct?

A That's correct.

Q All right. Let me just cover one

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[2824] February 26, 1986, at which time the following proceedings were held.)

THE COURT: For record purposes, the lawyers have agreed to excuse juror number sixty-seven, Lourice Collier.

Ms. Sztybel, first of all, I apologize to you for being late. We started late. The lawyers are not at fault. I want you to know that. They were all here. I had some business that I got bogged down in on my regular docket today.

With that in mind, I'm not going to take much more time except to ask you to be as comfortable and relaxed as possible under the circumstances

2825 VIVIAN L. SZTYBEL,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. Sztybel. How are you this morning?

A Fine.

Q I want to start out by reintroducing myself and every one else here. We were introduced on Monday, but that's

been a couple of days. My name is Jim Nelson and the gentleman seated next to me is Mr. Paul Macaluso. There is another lawyer who will be involved in this for the State of Texas and his name is Norman Kinne. He will be presenting the evidence. We're all three assistant district attorneys who have been assigned by Henry Wade to handle this case for the State of Texas.

Seated to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you

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[2828] bit, I'll talk to you and then these lawyers 6ver here may want to talk to you a little bit also. So here we go.

I feel like it is only fair to you that you know the position of the State of Texas in this case. We have been and are going to continue to actively seek the death penalty for Thomas Joe Miller-El. That man sitting right down there. We anticipate that we will be able to present to a jury the type and the quality of evidence to convince them, first of all, to find him guilty of the offense of capital murder and, second, to convince them beyond a reasonable doubt to answer those three questions on the board yes. The effect of those three questions being answered yes is that Thomas Joe Miller-El will be assessed the death penalty. There's no option. The Judge can't change the verdict. If those three questions are answered yes, Thomas Joe Miller-El will be taken to Huntsville and we anticipate at a time set by the law, be will be taken to the death house, injected with a lethal substance and he will have his life taken as a result of this verdict.

[2829] That's basically our position. I fèel like it is only fair that you know that going in because that's what we're going to be saying from now on throughout this trial. We anticipate we can present that type of evidence. Knowing that, what really counts, I guess, are your feelings and what you think

about some things. You had a chance on Monday to fill out a questionnaire.

I would guess that most people come down here thinking, well, maybe I'll serve on a civil case or be on a little shoplifting or purse snatching or something like that. You come in here and sit down and the Judge says, "Guess what, folks. You're on a capital murder case." Right after that be asks you to fill out this questionnaire and you don't have a whole lot of time to think about it. Now that you've bad a couple of nights to sleep on it and time to think, I'm going to ask you, if you would, to tell us in your own words, number one, how you feel about the death penalty and, number two, whether you feel like you could serve on a jury in this type of case?

A I'm for the death penalty. I feel

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[2846] well, he really ought to get a life sentence, 11e doesn't deserve the death sentence, but if we prove to you that each of those questions should be answered yes, then you're required by law to answer those questions yes. Do you have any problem with that?

A No, sir.

Q I guess, the bottom line of what I'm asking you is, can you set your emotions aside and listen to the evidence and answer those questions based on the evidence?

A Yes, sir, I feel like I can.

Q Okay. That's all we ask. You can see how each of those questions could be answered either yes or no depending on what the evidence is. We're going to ask you to keep an open mind until you've heard all the evidence before you make a decision on them. Any problem with that?

A No, sir.

Q Let me switch gears here for just a minute and talk about something that we don't anticipate will happen, but it's

something we need to talk about anyway just in case. I told you that we have what we call murder plus to [2847] make this a capital murder. Let's say there's a case where it's murder in the course of a burglary, for example. We present our case and we prove to you the murder, the Defendant knowingly or intentionally killed another human being without any legal justification or legal excuse, but you don't hear any evidence at all about a burglary, nothing, all we prove to you is murder. You can't find him guilty of capital murder in that case, can you?

A No, sir.

Q You have to find him guilty of the lesser included offense of murder. As I told you, that's not a death penalty offense in the State of Texas. Murder has the widest range of punishment that the legislature has given any crime, anywhere from five years up to ninety-nine years or life and a fine of up to $10,000.00. There's no death sentence for the offense of murder.

Now, I want to make myself clear about one thing. You mentioned self-defense earlier. If a jury finds self-defense in a murder case, that's not murder. That person is not guilty. If you find that it is an [2848] accident, he's not guilty. If you find that he was insane, he's not guilty. If it's killing in the heat of passion—like I have a four-year old daughter. If I saw her one time and she bad been abused and the guy that did it was standing two houses down laughing and bragging about it, I would probably lose my cool and go do something to him. Well, that wouldn't be murder because it's what we call killing in the heat of passion. That's voluntary manslaughter, but it's not murder. All of those are legal justifications or legal excuses. When we talk about murder in the State of Texas, we talk about killing someone without any legal justification and without any legal excuse. Am I making myself clear?

A Yes, sir.

Q In order for you to be qualified to serve on a jury, you have to be able to consider the entire range of punishment. Now, when we say "consider", you don't have to be able to sit there right now and say, yes, I'll give him five years or, yes, I'll give him life, yes, I'll give him twenty-three years, or whatever, because you haven't heard the facts. [2849] You don't know what the facts are, Would you agree with me, even though it's not self-defense or accident or something like that, there are just all kinds of situations in which a murder can occur, all kinds of facts? If we sat here for hours, we could come up with more and more examples of how a murder could occur. Would you agree with that?

A Yes, I would.

Q Okay. When we say are you able to consider, what that means is, if after you've heard all the evidence, everything you're going to hear, if you believe a life sentence or a ninety—nine year sentence is called for, could you give it?

A Yes.

Q Okay. By the same token, if after you've heard all of the facts and circumstances, you've heard everything you're going to hear, all the surrounding circumstances, the prior relationship between the parties, the whole thing, if you're convinced in your own mind after hearing all that, that a five year sentence is called for and a five year sentence is justified by those [2850] facts and circumstances, could you give it?

A If I've heard all the facts and evidence, yes.

Q You can't tell us right now what you'll do because you don't know the facts and circumstances. All we're asking you is, if you heard the facts and circumstances that justified it, could you give a five year sentence for the offense of murder?

A Yes.

Q I want to emphasize again—and I've said this three or four times—what we're talking about is the killing of another human being without any legal justification or without any

legal excuse, All we're asking you to do is keep an open mind and listen to all the evidence and then make a decision based on that evidence. Do you feel like you can do that?

A Yes, sir.

Q Okay. You can give five years in a proper case or you can give life or ninety-nine in a proper case; is that right?

A Yes, sir.

Q Okay. Now, I've used the phrase [2851] no legal justification or legal excuse. We're talking about self-defense or accident or that kind of thing, but there may be other circumstances or justifications or excuses that could enter into it like we talked about. There could be hundreds of different situations where it would be murder technically under the law, but there would be all kinds of things enter into it that might cause you to say a five year sentence is appropriate. Would you agree with me about that?

A Yes, sir, I do.

Q There's a couple of other things on murder, while I'm thinking about it. In Texas we don't have to prove to you motive for a murder. We may. You might hear evidence about it, but we don't have to prove it to you. We also don't have to prove to you that it was premeditated. Although you may hear evidence about that, but we don't have to prove it to you. Would you want us to prove either of those two things or let me put it this way, would you require us to prove either of those things knowing the law does not require us to do that?

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[2913] CHARLES M. SMITH,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Mr. Smith. Let me quickly begin by reintroducin'g every one here at the counsel table. My name is Paul Macaluso and to my immediate left is Jim Nelson.

MR. NELSON: Good morning.

Q When the trial actually begins, we'll be joined by another lawyer and his name is Norman Kinne. As you may recall from the introductions on Monday, we are assistant criminal district attorneys and we work for Mr. Henry Wade and we've been designated as the lawyers to represent the State in this case.

Now, to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: Good morning, sir.

Q And to his immediate left is Mr. Royce West

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[2916] unclear, by all means stop us and we'll clarify It as best we can. If there is something that you need to add, whether we touch on it or not, by all means just let us know what it is in fairness to both sides, okay?

A Okay.

Q Now, I know you were asked this question on the questionnaire itself, but let me just ask you. Knowing, of course, that this is the type case where the State is actively seeking the death penalty—in other words, we make no bones about it. We know the law allows for it and what we intend to do, of course, during the course of this trial is to provide a jury, once it is selected, with the type and quality of evidence that will convince the jury in the first part of the trial, Mr. Smith, that the Defendant, Thomas Joe Miller-El is guilty of the offense of capital murder exactly as he's charged in this indictment.

In the second part of the trial, we intend to provide a jury with the type and quality of evidence that will convince them, based on the evidence, beyond any reasonable doubt whatsoever that all the questions, [2917] whether it be two or three, but all of the 4uestions you receive should be answered in the affirmative which, as you know, automatically results in this Judge, Judge McDowell, mandatorially under the law assessing a sentence of death by lethal injection for Mr. Miller-El.

Now, you understand that's our position. We are actively seeking the death penalty. Ultimately, of course, it's up to the jury to make the final decision and the final determination. I think it is only fair to let you know, as we have the other jurors, exactly what our position is throughout this trial based on the evidence that we intend to provide. Okay?

A Yes.

Q Now, as I said, you were asked this question and really, I guess, it's one of the most significant questions. It's fifty— six, and you were asked how you feel about the death penalty. Let me just ask you if you would share with us, sir, in your own words with all of us how you do feel about the death penalty and then, secondly, is there any reason [2918] that you know of why you could not actually serve in a case of this particular type and render a decision that would result in the death of Mr. Miller-El based on the evidence?

A I think, like I wrote down there, I believe that the death penalty probably is the only deterrent that we have against people killing each other. I don't know of any reason why—I don't have any personal reasons why I couldn't, based on the evidence, render a decision.

Q That is, you know of no reason why you could not actually participate in that decision-making process and listen to the evidence and make those decisions?

A No.

Q Now, Mr. Smith, let me just ask you: Obviously, you're in favor of the death penalty for certain types of very serious offenses; is that correct?

A Yes.

Q Have you ever felt differently about it? Has there ever been a time in your life, for example, where you were against the death penalty or just felt differently about it

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[2939] A Yes.

Q Even though you might have a personal desire for a death sentence, if the State doesn't prove to you those questions should be answered yes, you must answer the questions no. Do you see what I'm getting at?

A Yes.

Q The flip side is true, too. You might say, I don't think the guy ought to die. I'd vote for a life sentence, if I could, but in all honesty the State proved yes, yes, yes. Can you do that?

A Yes.

Q Let's shift gears here for a second, Mr. Smith, to something that is very, very important. I'm not suggesting that it would occur in this case, but we need to discuss it at this time. That's a situation where, let's say, you're on a hypothetical jury, you're on a hypothetical capital murder case, and let's say that the State has alleged murder during a burglary, which you know is another type of capital murder, and you have no doubt, along with the other jurors at the end of the first part of the trial, that the [2940] Defendant is guilty of murder. There's no doubt about it, but you didn't hear any testimony about any kind of a burglary or you have a reasonable doubt about it. Well, you know, for us to expect you and the law expects you, to convict someone of capital murder, the State must prove both of those components, the murder and the burglary and we didn't do that, did we, in that example?

A Right.

Q Do you see what I'm getting at? You can't convict that individual of capital murder because we didn't prove capital murder. What did we prove?

A Regular murder.

Q Right. You got it. Now, if that were to happen, then the range of penalty, as I said earlier, is completely and totally different. Let's forget about mandatory life or death. That's just all out the window. It's not even a consideration. We're talking about a murder case. Mr. Smith, to be qualified as a juror on a murder case, regular murder case, all the law expects of you is what I think you already are and that is, number [2941] one, to be an open-minded person and expects you, naturally, to follow the law. I gather you're the type of person—you've been in the service and you know that there are certain things that you have to do whether you like them or you don't like them. Would you agree with me?

A Correct.

Q Do you feel that way about the law as well?

A Yes.

Q In other words, there may be some things that you disagree with, but we all do our best, of course, to certainly try to follow the law and I gather you would in that respect, would you not?

A Yes.

Q All right. Well, the law says and the law allows a very, very broad range of penalty for the offense of murder, as I said earlier, to encompass the infinite number of circumstances under which one person could knowingly or intentionally cause the death of another.

While we're on the subject, [2942] briefly, the Judge will actually give you definitions of those phrases, knowingly and intentionally. They may be somewhat different from what you commonly think those words mean. A murder is a knowing and intentional killing of another individual. While

that would have to be done without any legal excuse or any legal justification such as, like I said, self-defense or accident or insanity or a crime of passion, there could be a myriad of factual or practical, seat-of-the-pants, justifications or reasons that you would be allowed to consider during a murder trial when you learn about the relationship between the parties, the backgrounds of the various individuals and so forth that would tell you that one case deserves X amount and another case deserves XX and so forth and so on. Do you see what I'm getting at?

A Yes.

Q Now, what the law expects, of course, to be qualified as a juror is to just keep an open mind. Do you consider yourself an open-minded individual, Mr. Smith?

A Yes, sir.

[2943] Q That's all they expect of you. You haven't heard any evidence about a murder case, have you?

A No.

Q The law does not expect you to conjure up in your mind a set of circumstances as you sit there now where you would give X number of years or ten X. All the law says is this: I'll follow the law. I'll follow that range of penalty and, if I hear a case that I feel justifies, warrants and calls for, where I feel it's the right thing to do under the facts after I've heard them to give the maximum, I'll give the maximum whatever it is. That's the law. On the other hand, whether I can think of a case now or not, it doesn't matter. If I hear a case that I feel, after I've heard the facts, calls for and warrants and justifies and I think it's the right thing to do, whether I can think of it now or not, to give the minimum, then I'll give the minimum whatever it is. Any problem with that at all?

A No.

Q What I'm getting at is, the law sets the range of penalty as low as five years [2944] in the Texas Department

of Corrections all the way up to ninety-nine years or life to allow you as a juror to wait until you've heard all of the evidence, all the backgrounds, all the facts and circumstances, and then you decide whether it should be a five year case, fifteen year case, twenty-five year case, a ninety-nine year or life case. Can you do that?

A Yes.

Q If you heard a case that called for it and, like you say, warranted it and justified it in your mind the minimum, knowing the minimum is five years, do you have any reason why you couldn't assess a penalty of five years in the Texas Department of Corrections for murder?

A No.

Q Bear in mind that it may be difficult for you to give either the minimum or the maximum. It may require some special facts and circumstances before you would say, I'm going to give about five years in the penitentiary for killing somebody, to commit murder, but you will allow that there may be those circumstances out there, will you not?

[2945] A Yes.

Q If you hear them, there's nothing to prevent you from giving five years, is there?

A No.

Q The same thing would hold true for the upper range. It may take some real special facts before you give ninety-nine years or life, but if you see them and you hear them, you'll give ninety-nine years or life, will you not?

A Yes.

Q Now, there's one other matter here. If you're considering the range of penalty for murder, not capital murder, but murder, the law allows you to take into consideration certain—what the Judge would actually instruct you are certain aspects of the parole law. What it just boils down to—and I don't want to muddy the water, but basically what it says is, even though the Judge will give you instructions as to

certain things that are taken into consideration in deciding when somebody is eligible for parole, whether it be five years or ninety-nine years

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[2985] LINDA C. BAKER,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Ms. Baker. As I was introduced to you on Monday, my name is Jim Nelson. I want to reintroduce the other people who will be involved in this trial. Sitting next to me is Paul Macaluso and another person who will be involved in this for the State of Texas is a man by the name of Norman linne. Mr. Kinne will present the evidence for us in this case. The three of us are assistant district attorneys here in Dallas and we've been assigned by Mr. Wade to handle this case for the State of Texas.

Next to me is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Ms. Baker?

Q Next to him is Mr. Royce West.

MR. WEST: Ms. Baker, good

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[2988] because the law requires me to do that. I'm not naturally nosey or trying to bother you or badger you in any way, but I need to ask things in a certain way under the law and because we have such a short period of time to find out about these things. I hope you will be patient with me and, if I say anything that you don't understand or if I don't make myself clear or if you have any questions, I hope you will stop me so we can get them cleared up.

With that introduction, let me just start out. I feel like it's only fair, Ms. Baker, that you know what our position is in this case. The position of the State of Texas in this case is that we are actively seeking the death penalty for Thomas Joe Miller-El. We're actively seeking to have him executed. We feel that we will be able to present to a jury, the twelve people, the type and quality of evidence necessary to, first of all, convict him of capital murder and the type and qualify of evidence to, in the second phase of the trial, answer three questions yes. If those three questions are answered yes, Judge McDowell has no option but to sentence that man [2989] sitting right down there in the light blue suit to die. That's what the law says.

If the three questions are answered yes, be gets the death sentence. Ms. Baker, we talk a lot about things in the abstract. I would guess you've bad discussions with people about the death penalty and bow you feel about the death penalty and you kind of think about it. You hear about somebody being executed and, well, that's fine or that's good or that's bad or whatever, but you're not really involved. You're kind of separated from it. I want you to understand and I think it's only fair that we make it clear to you that now it's real.

If the jury answers those three questions yes, that man right down there in the light blue suit will be taken from here to the penitentiary in Huntsville, Texas and placed on death row. He will stay on death row until the time appointed by law and then he will be taken from his cell on death row and placed in a cell near the death house. On the morning that the law prescribes, he will be taken from that cell near the death house just a few steps away and [2990] placed on a gurney. He will be strapped down and he will be taken into what we call the death house. At that point he will have an IV placed in his arm, in one of his veins. Someone will put a lethal substance in that IV and it will be pumped into his body until the life is gone from him, that man right down there. That's

what we anticipate is going to happen, Ms. Baker, if the evidence comes out as we anticipate it will. Again, the reason I say that is so you will understand that we aren't really talking in the abstract anymore. We're talking about here and now and real people and real death.

Now, you had a chance yesterday to fill out a questionnaire—or Monday. Excuse me. You were asked your feelings about the death penalty on that questionnaire. If you would, I'd like you to tell us in your own words, number one, bow you feel about the death penalty and, number two, how you feel about your ability to serve on a jury like this where you may have to make this life or death decision?

A First of all, I am not totally in

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[3007] never been in this situation before. I have no idea bow long it would take me to get over it.

Q Do you still feel like you could take the oath?

A If I were chosen, yes, I could take the oath. I'm not going to say that I would have regrets about it later on, but that is my job as a citizen. Someone has to do it.

Q Let me shift gears here for just a minute and talk about something else that may come up. We don't anticipate that it will, but it might. If we were to prove to you not capital murder but just regular murder, then the death penalty is not an issue any more. At that point the range of punishment is different, Now, when I talk about murder, I'm talking about the knowing or intentional killing of another human being without any legal justification or excuse. In other words, a person know they were going to kill somebody and killed them without—it wasn't self-defense. It wasn't an accident. It wasn't a crime of passion. They weren't insane at the time. They knew what they were doing and they killed somebody knowing that they were going to [3008] kill the person. That's murder in the State of Texas.

Now, if you convicted someone of knowingly or intentionally causing the death of another human being, what do you think, just in your own mind personally, should be the minimum sentence that a person should be assessed for killing another human being without any legal justification or legal excuse?

A Knowing that he was going to kill the person and he knew that he was going to do it, I would say life. He's still living, but I think he is a menace to society.

Q Okay. If you were a juror on that type of case, your personal feeling would be to assess a life sentence; is that correct?

A Yes.

Q Could you ever under any facts and circumstances whatsoever assess a sentence as low as say fifteen years?

MR. WEST: Your Honor, I'm going to object at this point in time. Counsel is trying to get Ms. Baker to commit to a particular punishment without [3009] giving her the benefit of the full range of punishment, from five years to ninety-nine years or life and a $10,000.00 fine. I would object to Counsel attempting to get Ms. Baker to commit to what sentence should be imposed,

THE COURT: Mr. West, I'm going—

MR. CUNNINGHAM: Your Honor, that is improper in that the question should contain if she believed in her mind that the proper sentence should be fifteen years based upon the facts and circumstances that she bad heard in that case.

THE COURT: I'll let Mr. Nelson ask his question his way. I understand that the defense has added some qualifications, but the Court will ask the ultimate question. Go ahead, Mr. Nelson.

Q Did you understand my question, Ms. Baker?

[3010] A Would you repeat it, please?

Q Okay. Could you ever under any circumstances where someone has been convicted of the offense of murder as I've set it out, knowingly or intentionally taking another human life, assess a sentence as low as fifteen or twenty years, for example?

A I think it depends on the circumstances.

Q Okay. You stated earlier that you feel that you would like to see a life sentence en a life; is that right?

A If they proved it, yes, but there are different degrees no matter what. It could be someone that said, well, I'm going to go here and, if this happens, then I will kill no matter what, but in a sense that is—he's holding up for his own life. It's either kill or be killed and in a way that is self-defense.

Q You understand, if a jury finds self-defense, then a person is not guilty of the offense of murder. It's not murder any more, He's just not guilty.

A Uh-huh.

Q If the jury finds self-defense, the a person is not guilty of the offense of murder. It's not murder any more. He's not guilty.

A Uh-huh.

Q If the jury finds that it was a [3011] killing done somebody raped my little f I found out who did it and houses down laughing about it and I went and killed him, that wouldn't be murder. It would be what we call voluntary manslaughter. When we talk about murder, we're talking about the intentional taking of another life without any legal justification any legal excuse whatsoever.

A Do you not agree that someone trained in law procedures can make things as what they want to project them to be?

Q I think there are some people that are capable of doing that, yeah.

A Then it all in the way that it is presented to you and you have to draw your own conclusions.

Q Right. What I'm asking is—first of all, assume with me, if you will, that you as part of a jury have convicted someone of knowingly or intentionally taking another human life without any legal justification of legal excuse. You convict them of murder. Having done that, could you, under the proper facts [3012] and circumstances in your mind, assess a life sentence?

MR. CUNNINGHAM: Your that is an improper question. If she felt that it was proper based upon the facts and circumstance of that case and she believed that it should be five years—

MR. NELSON: I asked about life.

MR. CUNNINGHAM: Okay.

THE COURT: Go ahead. If that was an objection, I'll overrule it. Go ahead

Q Could you, under the proper facts and circumstances in your mind give a life sentence for that offense of murder?

A I told you at first, yes, I believe in a life sentence. If you're asking me could I in any circumstance go lower, yes, I could depending on the circumstances.

Q Could you ever go as low as five years?

A I don't know. I can't say.

Q Okay. I told you at first I might [3013] have to try to pin you down on some things. The law requires me to do so on this. I'm not trying to be rude and you're answering the same way most people would. Because you aren't there, it's hard to know. But I have to ask you, if you convicted someone of murder, knowingly or intentionally taking another human life, after hearing all the facts and circumstances, everything about the case you're going to know, it's not self-defense and it's not an accident and it's not insanity. It's none of those.

A Can you give me a hypothetical situation?

Q I'm not allowed to under the law. I can't do it. If after you've heard all the facts and circumstances, if you believed in your own mind that the minimum sentence was appropriate, could you give five years for the offense of murder?

A I'm sure that I could.

Q Ms. Baker, my time has run out. In fact two minutes ago my time ran out. I appreciate you being so patient with me and I appreciate your time and the answers to the

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[3017] (Whereupon, an off-the record discussion was held at which time the State preemptory strike against Ms. Baker.)

THE COURT: Ms. Baker, I want to thank you for your service down here Monday and again today.

(Whereupon, Ms. Baker left the courtroom, after which the following proceedings were held.)

MR. WEST: Your Honor, may the record, reflect that the prospective juror, Ms. Baker, in fact a black female. Out of ten strikes used by the State the State has used seven of them on blacks.

THE COURT: Mr. Nelson, do you want to reply to that?

MR. NELSON: Yes, The State's reason for exercising a preemptory strike in this particular case had

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[3020] DEBRA S. McDOWELL,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth, nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Ms. McDowell. You may remember us from way back on Monday. I'm Paul Macalulso and this is Jim Nelson. That's Brice Cunningham and Mr. Royce West is over there on the other side. We are the lawyers, over on this side of the table, that represent the district attorney's office. We're the prosecuting attorneys and we work for Henry Wade and we've been designated to represent the States in this case.

Mr. Cunningham and Mr. West are defense attorneys who have been appointed by the Court to represent the Defendant. He is charged with capital murder as I'm sure you know. He's at the very far right. You may be able to see him it you learn forward. He's charged with capital murder, the most serious level of offense under the laws of this state.

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3023] hesitated. You just tell us whatever is on your mind if you feel it might affect your service as juror on this very important case.

Now, we have five jurors so far in three and a half weeks of selection. We need seven more to begin the trial and you could be number six. We're looking for the people that we feel, both sides feel, are certainly qualified and best suited and who we feel will be the most fair and the most impartial. That's why we need to talk to you and ask you some questions. All right?

Now, let me tell you what our position is so that there is absolutely no mistake about it whatsoever. Ma'am, we are actively seeking the death penalty in this case for this Defendant. Although things have gotten a little bit lighter because we've been doing this for three and a half weeks and we have a sense of humor still, the bold-face reality of the

situation if that this is a capital murder case and the State is actively seeking the death penalty. We know that the law allows for it and we intend to provide a jury—and that would mean you if you were on this jury—with the type and quality of evidence that would convince them beyond any reasonable doubt that Mr. Miller-El is guilty exactly as he is charged in this indictment of capital murder. Then in the second part of the trial, again we intend to provide the jury with the type and quality of evidence that convinces them beyond any doubt based on reason whatsoever that those three questions should be answered yes which you know results in mandatory sentence of death.

I just tell you that, as we've told every other person we've talked to, because just out of an abundance of fairness to put on notice of what we intend to prove under the law by the evidence once the trial begins and what the strikes are.

Now, I know you were asked this questions and given precious little time to respond to it really. You've had a couple of more days to think about it and you may want to add something to it or you may not. Let me just ask you how you feel in your own words first about the death penalty itself, capital punishment, and then your ability to actually [3025] serve on a jury of this type and answer questions that you know would result in the Defendant being executed?

A I feel like, if there was a shadow of a doubt, that it should not be given, but if it is the only thing that would fit the crime, it must be given.

Q You believe in the death penalty, do you not?

A Yes.

Q For very serious types of crimes, I gather?

A Yes.

Q What sort of crimes come to your mind that you feel the death penalty would be proper for? I know it depends on the individual facts, of course, but you know as a category of offenses. You know, we could probably agree that people

shouldn't be executed for theft or stealing tires or something like that, but what sort of crimes do you think the death penalty would be warranted depending upon the individual facts and circumstances?

A When there has been an unnecessary

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[3046] said something to provoke the killing, even though it's not going to result in a not guilty verdict, do you understand, then decide whether the Defendant in killing the individual acted reasonably or unreasonably in the light of human experience. Do you see? Which in that case, you answer the question yes or no depending upon how you decide. Do you see what I'm getting at?

A Yes, sir.

Q Is there any reason why you couldn't answer any of these three questions yes or no depending upon the evidence?

A None that I know of.

Q Let's shift gears here for just a second and cover something that is very important. I don't think you would have any trouble with it, but let's just imagine again that you're on a capital murder jury. Let's say it's a capital murder and the indictment alleges a murder during a burglary. Let's say you hear the evidence along with the other jurors and you don't have a doubt in whatsoever based on reason that the murder occurred, but let's say you didn't hear any testimony about [3047] the burglary or you have a reasonable doubt. You're not sure the murder occurred during a burglary. You understand, if we charge someone with capital murder of that type and we expect you to convict him of capital murder, we've got to prove both the murder and the burglary, you see, and we didn't do that. See, we didn't prove the burglary. We proved the murder, we did not prove capital murder. You have to find that defendant not guilty of capital murder because we didn't prove it. Instead you find him guilty of what we did prove, which is what? Murder.

A Yes, sir.

Q If that were to happen—I'm not suggesting it's going to happen in this case. We've alleged a murder during a robbery. If that were to happen, you can just forget about automatic lift or automatic death. Those aren't even possible—you know, there's nothing—

A It is just a regular murder then?

Q A regular murder.

A I know what you mean. The [3048] punishment would be less.

Q Yes.

A Different?

Q Right. Altogether different. The range of penalty is as broad as any offense under the law of this State. It's broad because, I think every one will agree—the legislature has set it as broad as it has to encompass the infinite number of circumstances under which murders can be committed. You get to tailor the punishment of fit the crime. In fact, didn't you say something in there about that?

A Yes, the severity of it.

Q Right. You get to listen to the facts and then decide what penalty is actually called for after you and the other jurors have heard all the evidence. All that requires of you to be a qualified juror on a murder case, no capital but murder, is number one—about three things actually. One is that you will follow the law because you believe in the law; is that correct?

A Yes.

Q If the law sets the range of [3049] punishment at five years to ninety-nine years or life and an optional $10,000.00 fine, you'll follow that law; am I reading you right?

A Yes, sir.

Q Furthermore, that you have an open mind. You haven't heard any evidence on this case about a murder case, have you?

A No.

Q That's all the law expects. You haven't heard any evidence on which to make that decision yet, so you can't make the decision, can you? All the law expects you to do is follow the law, keep that open mind until you've heard all of the evidence in a murder case and then after you've heard all of the evidence, if you feel the facts that you hear in that murder case, even though you know it's murder. I mean, murder is murder. But after you've heard all the evidence, if you feel that the facts and circumstances surrounding that murder calls for and warrants and justifies the maximum sentence and you feel it's the right thing to do, the proper thing to do, you would give the maximum which you know is ninety-nine [3050] years of life and a $10,000.00 fine? Can you do that?

A Yes.

Q I'm not saying it would be easy. I know you would have to have some special facts to do that. The same thing would hold true for the minimum. You know, it wouldn't be easy to give the minimum. You would have to have special facts, wouldn't you?

A Yes, sir.

Q But after hearing all of the evidence, if you hear a fact situation the calls for, warrants and justifies the minimum and you know that the minimum is five years and you feel it's the right thing, the proper thing, to do, would you vote for a five year sentence, five years in the Texas Department of Corrections of murder?

A Yes, sir.

Q You paused there. I know it sounds—

A Well, I don't know.

Q You wouldn't keep an open mind and consider it, wouldn't you?

A Yes, sir.

[3051] Q And if you felt it was proper, you could vote for five years?

A Yes, sir.

Q If you felt it was proper after you heard all of the evidence?

A Yes, sir. If I've heard everything and I know what the law says that we have to decide, I could.

Q In other words, you will tailor the punishment to fit the crime once you've heard all of the facts and you can make a decision. You can't make a decision now, can you?

A No. That's why I hesitated because I don't know until I've heard it.

Q You haven't closed your mind to a five year sentence, have you?

A No, sir.

Q You haven't closed your mind to a ninety-nine year of life sentence, have you?

A No, sir.

Q Let's shift gears here for just a second. Let's talk about something the Judge said the other day. You know the burden of proof, of course, is always on the State to

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[3090] there are no right or wrong answers to anything any of us are going to ask you. We're just trying to find out how you feel about some things. We're going to discuss some law with you and give you and idea of what's to come if you should serve on this jury. We'll just ask you to be as honest with us as you can and be open and bear with us a little bit. The law requires us to be somewhat tedious and somewhat pointed at times, but we're not doing it to be rude. It's just necessary in the context we're in.

A I understand.

Q If you have any questions or anything comes up that I confuse you, which I have a tendency to do, or I get to talking too fast like I do sometimes, stop me and let's make sure we're clear on things before we move on.

I feel like it is only fair, ms. Willard, to tell you going in what our position is in this case. The State of Texas through Mr. Kinne, Mr. Macaluso and myself is actively seeking the death penalty for that man right down there, Thomas Joe Miller-El. We [3091] anticipate we will be able to present to a jury the type and the quantity of evidence to convince a jury to find him guilty of the offense of capital murder and type and quality of evidence to convince a jury to answer three questions yes. If those three questions are answered yes, then the death penalty will be assessed by Judge McDowell. He has absolutely no options in the matter. The jury makes the decision. One the jury render their verdict and the decision is made, he cannot change it.

Our anticipation is that, if those three questions are answered yes, that man sitting right down there will be taken to Huntsville, Texas and on a date se by law will be executed and have his life taken by lethal injection. That's basically our position. Everybody has their position on things, I guess, but the one that really matters right now is yours.

You had a chance on Monday after you tried to get over the shock of finding out this was a capital murder case to fill out a questionnaire. One of the questions on there [3092] was number fifty-six which related to your feelings about the death penalty. You answered it in quite a bit of detail, but you've had a couple of days to sleep on it and think about it. I would like to ask you, if you would , to tell us in your own words how you fell about the death penalty, number one, and whether you feel like you could serve on a jury in this type of case?

A Do you mean do I believe in the—

Q Are you in favor of the death penalty, against the death penalty, do you feel like it serves a purpose?

A May I explain?

Q Sure.

A Well, I feel that—of course, I know the bible says an eye for an eye and a tooth for a tooth, but to go further into detail, I feel like if you go and have premeditated thought about doing somebody bodily injury, then yes I don believe in the death penalty. If murder was not the utmost in your mind, then I'm not real sure what I – I don't know if I can give you an answer on that or not. I have mixed emotions about that.

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[3157] VIRGINIA M. WEBB,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified and follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Ms Webb.

A Good morning.

Q Let me begin by reintroducing everybody here. I'm Paul Macaluso and this Jim Nelson. Ma'am, once the trial begins we'll be joined by Norman Kinne. He's not here now, of course. We are all assistant criminal district attorneys and we work for Henry Wade. We've been designated to represent the State in this case.

Now, to Jim's immediate left if Mr. Brice Cunningham.

MR. CUNNINGHAM: Good morning, Ms. Webb.

Q I imagine sometime while we're talking he will be joined in the next chair by Mr. Royce West.

A Yes. I saw him on Monday.

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[3161] it or not. Let me tell you also that no one is going to try and quarrel with you and no one is going to try and play lawyer with you too much, I guess, or try and talk you into or

our of any position. That's not our responsibility to do that. Just let us know how you feel in all honesty.

Now, let me tell you where we stand in this case. As we've told every other juror at this particular point, we're going to tell you. We are actively seeking the death penalty in this case for Thomas Joe Miller-El. We're making no bones about it. We know that the law allows for the death penalty in a proper case under the proper circumstances. We fell that once this trial begins—we have six jurors now and we need six more. Once this trial begins we're going to be able to present to this jury both the type and the quality of evidence that will convince them beyond any reasonable doubt whatsoever that Mr. Thomas Joe Miller-El is guilty of capital murder just exactly as he is charged in the indictment.

Then in the second phase of the trial where the actual penalty is determined, [3162] once again we intend to be able to provide the jury with the type of qualify of evidence that will convince them beyond any reasonable doubt whatsoever that those questions should be answered yes beyond a reasonable doubt which, as you know, results automatically in the death penalty and the Judge assessing a sentence of death. Those are the stakes and that's what we're about. Again, as I said earlier, it's only fair to you, as—I've kind of lost count. You're number—

A Seventy-six.

Q The jurors that we've talked to we've let know exactly what out position is from the outset even though ultimately it's up to the jury to make these decisions, but we just want you to know where stand.

Now, I know you were asked this question and it comes down to this, I guess, basically: Question fifty-six asks you—without much presentation you had to answer that question, but how do you feel about the death penalty. Let me just ask you, having been given three or four night to sleep on it and

think about it and expand on it, if you have, [3163] if you would just share with us, Ms. Webb, your personal feelings about the death penalty and your ability to actually serve on a case of this type and render a decision that could result in the death of another individual?

A Well, it's a hard decision to make to ever take man's life. I mean, you would have to really feel in your heart that he's guilty and without any doubt, but at the same time, the way our criminal system is listing right now, if I felt a man was guilty truly and had done something like that, I could sentence him to death because I would rather do that than see him go to jail for seven or ten years and be back on the streets and perhaps kill or whatever somebody else.

Q Okay. I gather from what you said that you feel, if even somewhat reluctantly, the death penalty has a purpose in our society?

A Right.

Q And you do approve of that?

A Yes.

Q In certain situations, for certain individuals who commit certain types of crimes?

A Yes.

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[3185] sentence, if you had that to consider as a juror, put those aside and simply answer the questions and, like some people have said, kind of act like an umpire, and impartial judge of the evidence to decide whether of or not the State has proven beyond a reasonable doubt based on the evidence that the questions should be answered yes. If you do, then answer them yes. If you don't, follow your oath as a juror and answer the question no. Can you do that?

A Yes.

Q Okay. Let's shift gears here for just a moment and talk about a situation that I'm not suggesting will occur, but we

have to discuss it just in an abundance of caution. Hypothetically again imagine that you're on a capital murder jury, not this one, but another one. Let's say the State has alleged—I didn't even tell you earlier the different types of capital murder, but one type of capital murder we're talking about here is a murder where one person knowingly or intentionally causes the death of another individual. Murder is done without any legal excuse or legal justification. Now, there may [3186] be myriad of factual excuses of justification that we could take into consideration if you're on a jury, the relationship between the parties, you know, what led up to this murder—and I can't give you examples. You know as well as I do—we've both lived long enough to know that there are myriad of different reasons, an infinite number of reasons, that could lead up to one person killing another that fall short of a legal excuse. There's no legal excuse for it, but there may be all sorts of human excuses. Do you see what I'm getting at?

A Yes.

Q I'm not going into any justifications, but considerations, let's put it that way. If you commit murder, that's not a capital offense itself. You can't receive the death penalty just for murder in Texas. It must be murder of a policeman, fireman, jail guard, murder for hire and so forth and so on. Those are the categories, murder during the commission of another offense. We've alleged murder during a robbery. Murder during a [3187] burglary. Murder during a kidnapping, arson or a burglary.

Now, let's suppose you're on a capital murder jury, but not one like this where we've alleged murder during a robbery, but let's say murder during a burglary. You know, of course, to prove capital murder to you, we have to prove both the murder and the burglary or murder and a robbery, murder and a rape. Do you see what I'm getting at?

A Yes.

Q All right. If we expect you to find him guilty of capital murder—let's say during this hypothetical trial, we prove the murder, but we don't hear any testimony about the burglary, as an example. Do you understand that you couldn't find that Defendant guilty of capital murder under those circumstances simply because we didn't prove capital murder. What we prove?

A Just that they murdered somebody.

Q Right. So you would have to find them not guilty of capital murder and find then guilty of what we did prove, which was murder. If that were to happen, ma'am, forget all about [3188] mandatory death or life. Those are out the window and they're not even a consideration. Under those facts, under a murder case, if you were on a jury, having convicted somebody of murder, the law sets out the broadest of all ranges of penalty under the laws of this state. I think we all agree here that it's as broad as it is to encompass what we talked about earlier, the infinite number of circumstances that you could hear as a juror surrounding the murder of one individual.

Now, bear in mind that we all respect human life and we all know that murder is a bad proposition to begin with, but the law allows you to take into consideration the fact that murders are just worse than others. The law also allows you and expects you as a qualified juror on a murder case to keep an open mind. I get the impression you are an open—minded person. You've already told us you're the type of person who would follow the law and you respect the law.

A Right.

Q It boils down to this, ma'am: The law does allow you to tailor, as the old cliché [3189] goes, the punishment to fit the crime once you've heard all of the facts surrounding the murder. Now, bear in mind that murder is, like I said earlier, asituation where one person knowingly or intentionally causes the death of another without any legal excuse or any

legal justification. In other words, it's not a situation where someone is killed in self—defense. If you believe that someone acted in self—defense, you have to find them not guilty. Or if someone was insane or it was an accident or a crime of passion, but where someone intended to kill somebody for whatever reason they have. There could be a myriad of different reasons.

Now, all the law says to be a qualified juror that, one you will follow the law and consider that full range of penalty and then wait and keep your mind open until you've heard all of the evidence and then decide what the proper punishment should be, what you feel is proper, based on the facts as you decide them to be. In other words, you haven't closed your mind to the lower range or to the upper range. If you're on that jury and once you've [3190] heard all of the evidence, if you feel it's proper and warranted, justified and just simply the right thing to do to give the minimum, you will give the minimum whatever it is under the law. The same thing would hold true, if you've heard all the facts of a murder case, if you've heard one where you think it's proper, warranted and justified and again simply the right thing to do after you've heard all of the evidence to give the maximum, you'll give that. Can you do that?

A Yes.

Q Even bearing in mind that the minimum, for example, for murder is five years. Bear in mind that you're not expected to sit there and think of a situation now where you would say, well, I can't think of a situation where I would give five years. No one expects you to do that. You're just expected, to be a qualified juror, to be able to tell us, if you see a case that to your way of thinking after you heard the evidence, if the facts call for it and it's five years, I'll give five years even though it may be tough to do to give the minimum. The same thing would hold true for [3191] the maximum. If you hear a case that you think calls for ninety-

nine years or life, even though it may take special facts, a real aggravated case to do that, you would give ninety-nine years or life?

A Yes.

Q Can you do that?

A Yes.

Q If it's the law, you're going to follow it; is that correct?

A Right.

Q I've just got one or two other matters to cover with you. You understand that the Judge said and, as we said earlier, the State has the burden of proof and the law allows us to prove a case in a variety of ways. As the Judge told you the other day, the law does allow the State to prove a case, even a case of capital murder, with the testimony of one eyewitness if you believe that eyewitness beyond a reasonable doubt. Could you do that, Ms. Webb?

A Yes.

Q Motive and premeditation are two things that the State is not required to prove

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[3260] KEVIN C. DUKE,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Mr. Duke. As I was introduced on Monday, my name is Jim Nelson. want to reacquaint you with everybody else who is sitting here. This is Paul Macaluso sitting next to me. Another man who will be involved in this for the State is a man by the name of Norman Kinne. Mr. Kinne, Mr. Macaluso and myself are all assistant district

attorneys in Dallas. We've been assigned by Henry Wade to handle this case for the State of Texas.

Seated to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you this morning, Mr. Duke?

MR. DUKE: Fine.

Q Next to him is Royce West.

MR. WEST: Mr. Duke, good morning.

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[3263] Let me just start out by telling you what our position is in this case. The three of us representing the State of Texas and the district attorney's office are actively seeking the death penalty for Thomas Joe Miller-El in this case. We feel that we will be able to present to a jury of twelve people the type and qualify of evidence to allow them to convict him of capital murder and the type and qualify of evidence to allow them to answer three questions yes. If those three questions are answered yes, Judge McDowell has no choice but to assess the death penalty in this case. That's exactly what Judge McDowell will do in that case.

We anticipate, if those three questions are answered yes, at a time prescribed by law Thomas Joe Miller-El, sitting right down there, will be executed by lethal injection. Now, that's our position and we will maintain that position throughout the trial, but what I'm more interested in is your feelings.

You filled out a questionnaire on Monday. One of the questions on there was [3264] about the death penalty, how you feel about the death penalty. You've had a little more time to sleep on it and think about it now. I'd like to ask you to tell us just in your own words whether you're in favor of or against the death penalty and whether you feel like you could serve on this type of jury or not?

A I think you have to have the death penalty. I think sometimes it should be up to the person who is convicted because, if he's sentenced to life imprisonment, sometimes death would be better to me than—being in prison would be like dying every day and, if you were in prison for life with no hope of parole, I just as soon have it over with than be in prison for the rest of your life. If he's committed a crime like this that maybe he should be convicted of and put away, if he's not put away for life, that's—if he has no chance for parole, then I don't see the difference between death and life imprisonment. If there's a chance for parole, that's a different story, but I think you might as well go ahead and give the death sentence instead of life in prison because it's the same thing to

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[3279] proves to you beyond a reasonable doubt that those should be answered yes, answer them yes. If we don't prove that to you, if you have a reasonable doubt, then you answer them no. Can you keep an open mind and listen to all of the evidence before making that decision?

A Yes, sir.

Q If question number three is not submitted to you, then the sentence will depend on your answers to questions one and two. If both of them are answered yes, it's the death penalty. If one or the other or both of them are answered no, then it's a life sentence. Have I made myself clear about that?

A Yes, sir.

Q Now, there is something that may come up. We don't anticipate that it will, but it might so we need to talk about it for a couple of minutes. I told you that we call this type of capital murder murder plus. Let's look at a case—let's not use this one. Let's use a murder in the course of a burglary, for example, and you're sitting on the jury and we present evidence to you that shows you that the defendant killing a person, knowingly or [3280] intentionally caused his death,

but you don't hear anything about a burglary. Now, we haven't proved capital murder to you, have we?

A No.

Q We've proved murder. I think I told you earlier that has a different range of punishment in the State of Texas. The death penalty is no longer an issue. The range of punishment for the offense of murder in Texas is anywhere from five years up to ninety-nine years or life and an optional fine of up to $10,000.00. In order for you to be qualified to serve as a juror, you have to be able to consider the entire range of punishment for the offense of murder.

We use the phrase "able to consider". That's a legal phrase and let me see if I can explain that a little bit. You don't have to be able to sit there right now and tell us you will give somebody life or tell us you'll give somebody five years anymore than you can sit there and tell us you will give somebody the death penalty because you don't know the facts and we can't tell you the facts at this time. The law doesn't allow us to. [3281] When we say able to consider, basically what we mean is this: After you've heard all of the facts and circumstances you're going to hear, all of the evidence in the case, the facts about this offense, anything about the person on trial that you're ever going to know, after you've heard all of it, if you believe based on all of that that the proper sentence is ninety-nine years or life, could you give ninety-nine years or life for the offense of murder?

A You're saying you've proven that he's committed the murder?

Q Okay. Let me make that clear because I've kind of jumped over it a little bit. Murder in Texas is knowingly or intentionally killing another human being without any legal justification and without any legal excuse. In other words, if it's self-defense, then the person is not guilty. If it is an accident, the person is not guilty. If the person who did it is insane, they're not guilty. If it's a killing in the heat of

passion, somebody raped my four year old little girl and I found out who did it and he was standing two houses down laughing and telling [3282] everybody about it, and I went down and killed him, that would be killing in the heat of passion. That's not murder, either. That's what is called voluntary manslaughter.

A Right.

Q So when we talk about murder, we're talking about knowingly or intentionally killing another human being. They decided to do it, knew they were going to do it and did it. Are you with me so far?

A Yes.

Q Now, would you agree with me that there can be hundreds and maybe thousands of different situations where one person could kill another person?

A Right.

Q I'm not even allowed to give you examples of what some of those situations might be, but there could be provocation from the person who got killed that wouldn't amount to self-defense, but might affect why the killing occurred, all kinds of—the prior relationship of the parties, you could hear about that, if they had trouble before, if they were fighting or something. You can hear all [3283] the surrounding facts and circumstances in a murder. In other words, you can know everything about the murder and you will probably get some information about the person who committed the murder.

If you found somebody guilty of the offense of murder, the law says that the range of punishment, which is the widest in the State of Texas, is anywhere from five years up to ninety-nine years or life. Now, I think, it's probably to take into account the hundreds or thousands of different fact situations where a murder could occur. We talked about it like knowingly or intentionally caused the death of another individual without any legal justification or without any legal

excuse. Well, that's what murder is, but a lot of things can enter into that. It's still a murder, but a lot of circumstances can come into it, so what the law says is, after you have heard all of the facts and circumstances relating to that case and to that defendant, then you have to make a decision on what the punishment should be.

Obviously since the legislature [3284] has set that wide range of punishment, we can't have jurors who have their minds closed completely to one end or the other. You don't even have to be able to sit there right now and think of a set of circumstances where you would give five years or where you would give ninety-nine years. What you have to be able to tell us is that you will listen to all the facts and all the evidence and keep an open mind and, after hearing all the facts and all the evidence, everything you're going to hear, if you believe that it's a proper case based on those facts and circumstances for a life sentence, would you give a life sentence?

A Yes, I would.

Q Let's go to the other end. Again, you've heard all the facts and all the circumstances, everything that enters into it. If you've heard everything and after hearing all that, you believe in your mind that this is a proper case that calls for a five year sentence, can you give a five year sentence?

A Yes, sir.

Q Okay. For the offense of murder, is there any problem with that?

[3285] A No.

Q Again, I want to emphasize that you don't have to be able to sit there right now and think of a set of circumstances where you would give five years. All you have to tell us is, if you hear that set of circumstances, whatever it may take—you may not be able to tell us what it would take, but if you hear it, you can say, well, this is that one case in a million that calls for five years and I'll give five years?

A I'd have to know what happened.

Q Right.

A If I could give from five to ninety-nine.

Q If you thought it deserved five years, you could give five years and, if you though it deserved ninety-nine years, you could give ninety-nine?

A Yes, sir.

Q If you thought it deserved twenty-three point seven eight years, you could give twenty-three point seven eight years?

A Yes.

Q Or anything in between?

[3286] A Yes, sir.

Q Any problem with that at all?

A No.

Q Now, there's one other instruction that you may be given with reference to that. It basically says—and I've got a copy of it here in my band. I'm not going to read the whole thing because it's kind of long. It says that a defendant may earn time off the sentence imposed through good conduct time. It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the aware of parole. It says it cannot accurately be predicted how the parole law and the good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment because the application of these laws depends on decisions made by the prison and parole authorities.

What that is saying is, good time exists and parole exists, but we don't know how it's going to be applied because that's up to the Board of Pardons and Paroles and up to the governor.

A Right.

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[3313] A I'd say the death penalty is the maximum.

Q What would you set the minimum to be?

A For just murder by itself?

Q Right, just murder, He knew he was going to do it. He intentionally did it and he did it.

A I would say five years with no parole to that.

Q You would say five years with no parole?

A Yeah. If you murder someone, you need the time to think about it. If you're going to go back into society, I think you need time to adjust before you go back into society.

Q Let me ask you this: 2he minimum in the State of Texas is five years.

A With parole.

Q With parole. Now, the law is, if a person is sentenced to six years or less, they have to serve at least two years before they're eligible for parole.

A Right.

Q How do you feel about that law?

[3314] A I think it's a good one. If they've changed within those two years and they can be a responsible human being and live in society, I see nothing wrong with it.

Q What about in a case of murder?

A I believe in forgiving. They can change. If they're the same human being and they're just going to go out and murder someone again, there's no way. If they go out and murder someone again, you know, that's not good for society to put them in jail for two years and then let them go and they do it again. If someone can change—someone can change their mind about things and see what they've done and change their life and come out in two years and be a responsible human being, I believe in that. I would definitely like the parole board or whoever let's these people out to definitely know what they're talking about before they let them out.

Q You're telling both sides that you could consider the full range of punishment in this case; is that correct?

A Yes, sir.

Q And you could listen to the facts

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[3322] LOUIS C. WOLTERS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAM INATI ON

BY MR. MACALUSO:

Q Good afternoon, Mr. Wolters. Let me begin briefly by reintroducing everyone here. I'm Paul l4acaluso and this is Jim Nelson. When the trial begins, we will be joined by another fellow by the name of Norman Kinne. We are assistant criminal district attorneys here in Dallas County and we work for Henry Wade. We have been designated as the lawyers to represent the State of Texas in this case.

Now, the gentleman to Jim'simmediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are youthis afternoon?

MR. WOLTERS: Just fine.

Q To his immediate left is Mr. Royce West. I imagine you recall from Monday that they were introduced to you. They're the

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[3325] yet and I don't think we'll start with you. We just want to know how you feel. It's just that simple. We have our position with regards to this case, but it really doesn't matter. What we're concerned about is how you feel: If you have a question about anything, by all means ask it. Don't be

bashful. If there is something you would like to tell us, go ahead and ask it or tell us at any time if you feel it would impact on your service as a juror. Bear in mind that no one is going to try and change your mind.

Now, let me tell you where we stand. The State is actively seeking the death penalty in this case for Mr. Thomas Joe Miller-El. We know that the law allows for it, Mr. Wolters, if the proof is there. We intend simply to provide the jury with the type and quality of evidence in the first part of this trial that will convince this jury, once it's composed, beyond any reasonable doubt whatsoever that Mr. Thomas Joe Miller-El is guilty of capital murder just exactly as' he's been charged.

In the second part of the trial, [3326] as the law requires, we intend to provide the 3ury with the type and the qualify of evidence that will convince them beyond a reasonable doubt that the questions the Judge would submit to the jury should all be answered in the affirmative, yes, yes, yes, which you know under the law of Texas results automatically in a sentence of death. Do you see what I'm getting at?

A Yes, I do.

Q The only reason I'm telling you that is because—is just to let you know, as we have let every other prospective juror that we've talked to know, exactly what our position is based on the evidence and provided for by law and what we intend to prove and what our position will be during the course of this trial. As I said earlier, everyone has got their position, as the old saying goes. The position that really counts ultimately will be the position of the jury.

Now, you were given precious little time to fill these questionnaires out, about fifty-nine separate questions. One of them is, of course, about your feelings about [3327] the death penalty and whether or not you could serve on this jury. You've had two or three nights to kind of think about it, Let me just ask you before we go any farther, would you just

share with us, all of us, your personal feelings about the death penalty, how you feel about capital punishment, and then secondly your ability to serve or not to serve on this type of case and make a decision that could ultimately result in the execution of the Defendant?

A The first part of the question, I believe that the death penalty is necessary in a lot of cases. I believe that society is only as effective as the laws it enforces. Although nobody likes the idea of having to sit in a case like this, if not, then the system won't work.

MR. WEST: Would you speak up some?

A I'm sorry. If nobody wants to sit on this, and nobody does, then the system will not work. It's necessary. It's a duty and I believe everybody has a responsibility to that.

Q In other words, you do—you've

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[3351] A None at all.

Q You would just let the law take it's course without regard to whether it's the death sentence or a life sentence. Fair enough?

A Fair enough.

Q Okay. Let's shift gears here because I'm just about out of time, Mr. Wolters, and I've got a couple of other real important things I would like to cover with you. Let's imagine for a second that Mr. Wolters is sitting on a hypothetical capital murder jury. Let's say it's a murder during a burglary. You're convinced along with the other jurors after the first part of the trial, the first stage, that a murder occurred. You don't have a reasonable doubt about it. No doubt about it at all, but you didn't hear any evidence about the burglary or you had a reasonable doubt about it.

You understand, in a situation like that, the State has to prove both components of the offense of capital murder, the

murder and the burglary, if we expect you under your oath as a juror to find someone [3352] guilty of capital murder. Am I making myself clear?

A Yes. It's my understanding that this is murder plus, that you have to prove the murder and the plus?

Q And the robbery. We didn't do that in that example, did we? What did we prove? Just murder.

A Just murder, yes.

Q In that case, you find the defendant not guilty of capital murder because we didn't prove capital murder. You find him guilty of what we did prove which was murder. I'm not suggesting that's going to happen in this case or any other case, but it's something we need to discuss. If that were to happen, then you can forget all about—you convict someone of murder, you see, not capital murder, but just murder. The range of penalty is altogether different. Forget about automatic life and forget about automatic death, okay? Instead, the range of penalty for murder is as broad as any offense under the laws of this state, Mr. Wolters.

I like to think, and I think [3353] everyone here agrees, that it's as broad as it is to encompass what we talked about earlier and that is the infinite number of situations where one person can commit the offense of murder and all the facts that surround it and make each and every murder a little bit different and worth of different consideration. Would you agree with me?

A Yes.

Q Like I said earlier, all the law expects of you, as a qualified juror on a murder case, is to, number one—well, it's about three things, really. The first is to follow the law, agree to follow that range of penalty—that's from five years to ninety-nine years or life—and simply tell us that you have an open mind. Obviously you haven't heard any evidence at all, have you? You don't know anything about a murder case to which you could make an intelligent decision?

A Not at this point, no.

Q Just tell us that you're an open- minded person and you will wait. You will listen attentively to all the evidence, all the circumstances, all of the facts surrounding a [3354] murder case and after you've heard all of the evidence and then and only then, if you feel that it's proper, warranted, justified and the right thing to do to give the minimum, you will give the minimum whatever it is that the law provides for. The same thing would hold true after you've heard the facts and circumstances of a murder case and you believe that the facts and circumstances warrant, call for, justify and it's the right thing to do and the proper thing to do under those facts, once you've heard them, to give the maximum, you will give the maximum. Can you do that?

A Yes.

Q In other words, no one expects and the law does not expect you to simply right now say, well, I can't think of a case where I would give five years or I can't think of a case where I would give ninety-nine years or life and a $10,000.00 fine. The law does not expect you to be able to think of a case like that, but simply to tell us that, if you see a case and it's a proper case to your way of thinking after you've heard the evidence and you feel it's the right thing to do and the [3355] proper thing to do under the law to give five ears, you will give five years whether you can think of it now or not. The same thing if you can think of a ninety-nine year or life case nor or not.

A All right.

Q Am I reading you correctly, Mr. Wolters?

A Yes.

Q Because you're the type of person who is going make a decision based on the evidence and only after you've heard it, right?

A Yes.

Q One of two other matters here and then I'll let the other lawyers talk to you, sir. Do you understand that the law

does put the burden of proof solely on the State and it never shifts over there. He has nothing to prove and nothing to disprove. We have everything to prove. Do you understand that?

A Yes.

Q Mr. Wolters, the law allows a conviction for murder or capital murder on the eyewitness testimony of one individual if you believe that eyewitness beyond a reasonable

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[3417] ahead and take care of the other matter. That's semi-urgent, I think; is it not? Ms. Terry, we've got a matter unrelated to this case that Mr. Nelson is involved in and he's going to be the prosecutor who talks to you. If you will bear with us for about five or ten minutes, okay?

(Whereupon, Ms. Terry left the courtroom for a short period of time and then returned to the courtroom and the following proceedings were held.)

THE COURT: I'm sorry to keep you out there in the hail. Ms. Terry, the lawyers have agreed to excuse you in this case. Both sides agreed which I approve because, everything considered, it's probably the best way to handle it. I thank you for your attendance down here today and for your apparent willingness to

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[3433] CHERYL A. DAVIS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. Davis. flow are you this morning?

A Fine.

Q Good. As I was introduced to you on Monday, my name is Jim Nelson. I'm going to be talking with you for the next few minutes about some things. I want to start out by reintroducing everybody else who is here. The gentleman sitting next-to me is Paul Macaluso. As you were told on Monday, I think, a third person will be involved for the State and his name is Norman Kinne. He will be presenting the evidence for the State of Texas in this case. He's not down here today, but you will see him when the trial starts.

The man seated to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM; Good

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[3436] the jury at this point. You can see that it isther tedious and it takes a lot of time and I hope you will be patient with us as we go through it.

Let me just start out by asking you if you know any of us who are sitting here or who are going to be involved in the trial?

A Never seen you before Monday.

Q Okay. I'm going to start out, Ms. Davis, by telling you what our position is. The State of Texas in this case is actively seeking the death penalty for Thomas Joe Miller-El. We've been telling the jurors that for four weeks now and we're going to continue doing that until the trial is over. We feel like we can present to a jury the type and quality of evidence to convince them beyond a reasonable doubt that Thomas Joe Miller-El is guilty of capital murder and we feel like we can present sufficient evidence and the quality of evidence to convince you to answer three questions yes. If

those three questions are answered yes, Judge McDowell has absolutely no choice but to assess the death penalty in this case. That's the death penalty for that man [3437] sitting right down there.

That's basically our position. I feel like it is only fair that you know that going in because that's what you're going to hear from now on. What really counts is how you feel and your position on things. You had a chance to fill out a questionnaire on Monday. A lot of people have told us that when they got these questionnaires, they hadn't quite gotten over the shock of finding out this was a capital murder case that they were on.

One of the questions, number fifty-six, is about the death penalty and your feelings about the death penalty. I'd like you, if you would, to just tell us in your own words, first of all, how you feel about the death penalty tnd whether it serves a purpose in our society or not and, secondly, whether you feel like you could serve on this type of jury, this type of case?

A I've always felt in the past that I wouldn't have any trouble—you know, I've never been confronted with having to do it before, but I honestly think, if there wasn't a doubt that someone was guilty of murder, I

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[3447] A Yes.

Q Okay. Now, when you talk about premeditation, you're talking that they planned to do it, you said, before they leave the house. That's fine. If you feel that way, that's fine, but we just need to find out because, if you're going to require that of us, then you're requiring us to do something that the law doesn't require us to do.

A I believe I understand the difference in what you're saying.

Q Okay. Are you going to require us to prove that it was premeditated or, if we show you that it was knowing or intentional, will that be sufficient?

A Yes.

Q Okay. Any question about that?

A No.

Q Now, we were talking a few minutes ago about the range of penalty for murder. I told you it's anywhere from five years up to ninety-nine years or life and a $10,000.00 fine. Again, we're talking about murder, not capital murder. Say, for example—in this case we have a murder in the course of a [3448] robbery. Let's pick something different. Let's say we have a murder in the course of a burglary.

A I don't know the difference between a burglary and a robbery.

Q Okay. A burglary is if you break into somebody's house and steal something and they aren't there. That's the burglary of a house. We call it burglary of a habitation in Texas. Let's say we have a murder in the course of a burglary. They burglarize the house and kill somebody. We put evidence on and we prove to you that he knowingly or intentionally killed this person, but you don't hear •any evidence at all about a burglary, nothing. We haven't proved capital murder then, have we? All we've proved is murder because we haven't proved the plus. Remember that it has to be murder plus?

A Yes.

Q Okay. We haven't proved the plus, so all we've proved to you is murder. That's where the other range of punishment comes in. We talked about murder as the knowing or intentional taking of another human life [3449] without any legal justification or without any legal excuse. Again, it's not self-defense. It's not an accident. It's not insanity and it's not a killing in the heat of passion. If I find out somebody raped my four year old daughter and was standing two houses down laughing about it and I went down

and killed him, that would be killing in the heat of passion. It's still a killing, but it's voluntary manslaughter. It's not murder. We're talking about murder. Are we clear on that?

A Yes.

Q The law says that the range of punishment is from five to ninety-nine or life and every juror, to be qualified, has to be able to consider that entire range of punishment. By consider I don't mean you have to tell us right now you will give five years and you don't have to tell us right now that you will give life or you will give sixty-two years because you haven't heard any of the facts. You don't know what the facts are and we can't tell you at this point what the facts are. We can't even give you examples of facts. [3450] All you have to be able to tell me and Mr. Cunningham and the Judge is, you will keep an open mind. You will listen to all the facts and circumstances. You will listen to all the evidence and after you've heard all that evidence, you will make a decision. Do you have any problem with that?

A No.

Q Okay. You have to be able to tell us that, after you've heard all the facts and circumstances, everything you're going to hear about the offense itself, the crime itself, and about the person who committed the crime, if you believe in your own mind that a life sentence is called for would you give it? The other end is, if you believed after you've heard all the facts and circumstances and you know everything about the case and about the defendant that you're ever going to know, if you're convinced in your mind that five years is appropriate for this case, could you give that?

A Yes.

Q You don't even have to be able to sit there right now, Ms. Davis, and say—and [3451] think in your own mind of a case that would justify five years or a case that would justify life. You just have to tell us, if you hear that case maybe sixty years from now, you hear that one in a million case and you say, I never thought I'd hear it, but here it is, a case that calls

for five years, you'll give it. I'll give five years. The same thing for the life sentence, I never thought I'd hear it, but this is it. These facts call for a life sentence and I'll give it. Do you have any problem with that?

A No, and I believe I could.

Q You believe, if the facts called for five years, you could give it and, if the facts called for ninety-nine years or life, you could give it?

A I do.

Q Let me mention one other thing while we're talking about it. There's been a law passed by the legislature that you may or may not know about that relates to parole and good time. It basically says it is possible that a defendant sentenced to a term of imprisonment may earn time off his sentence

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[3469] A That I read the book?

Q Yes.

A About a year ago.

Q I believe you told Mr. Nelson the reason that you believe in the death penalty was because people get out of jail and do the same thing again?

A That would have a bearing on it, certainly. I certainly don't know the limitations of the law, but reading the paper, watching TV and that sort of thing. It just seems like a lot of people do bad things and don't have to pay for them. They get right back out and do it again.

Q That's why you believe, if a person kills another person without any legal justification or any legal excuse, that person should receive the death penalty?

A That's one of the reasons, yes.

Q And you would never vote for five years for a knowingly and intentionally taking of another person's life?

A I don't believe I could.

Q You mentioned on your information sheet that your spouse had been charged with [3470] theft?

A Yes, sir.
Q Has that case been disposed of?
A He got probation and was off probation in '83.
Q I'm sorry?
A He got seven years probation and it was off in '83.
Q Was that here in Dallas?
A Yes, sir.
Q And you say he completed his probation in 1983?
A Uh-huh.
Q Do you remember whose court that was in?
A Judge Scales?
Q The 195th. You don't hold any grudge against the police or the district attorney's office or anybody else?
A No, sir.
Q You could be fair to both sides?
A I believe so.
Q Mr. Nelson told you, and it is true, that in Texas the State does not have to prove premeditation, They do not have to prove

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[3508] enough?

A Fair enough.
Q Okay. Let me tell you what our position is, Mr. Spence, from the very outset, that is the position of the State of Texas relative to this particular case and this Defendant. Mr. Spence, we are actively seeking the death penalty in this case for Thomas Joe Miller-El. Now, we know that the law allows for it under the proper facts. We know what the law is and we know that the law allows for it and we intend to provide this jury—we have seven jurors now and we need five more. We intend to provide this jury, once it is selected, with the type and the quality of evidence that will convince them beyond any reasonable doubt whatsoever that Thomas Joe Miller-El is guilty of the offense of capital murder just exactly as he's charged in this indictment.

Then in the second phase of the trial where the penalty is actually determined, whether it be death or life, we intend to be able to provide that same jury with the type as well as the quality of evidence that will convince them beyond any reasonable doubt whatsoever that [3509] those three questions should be answered yes. You know the result of three yes answers or all yes answers is a mandatory sentence of death. D you see what I'm getting at?

A You're talking about these questions?
Q Yes, sir. Now, I'm just telling you what our position is just as we've told—you're number eighty-five and we've told every other prospective juror that we've talked to the same thing just to put the juror on notice of exactly what we intend to prove based on the evidence so it will come as no surprise what our position is at the close of the evidence. Do you see what I'm getting at?
A Yes.
Q Now, ultimately what our position is doesn't really matter. Do you understand that? What really matters is the decision that will be made ultimately by people like yourself if you're on this jury. Now, Mr. Spence, what we're looking for, of course, ultimately are the twelve people that both sides feel are the most fair and the most impartial; in other words, the best suited to listen to the facts of this case [3510] and make certain, as you can see, very, very, very important decisions. So that's what we wan to talk to you about and get your feelings and impressions about.

Now, what we're looking for, of course, is the type of juror who, number one, will follow the law with regard to the law that will come into play in this case and certainly follow their oath as a juror which would require them, as you did in that last case, to render a true verdict according to the law and then according to the evidence. Is there something that you want to say there?

A No, sir. I agree.

Q Now, let me just—I've done quiti a little talking here myself and the object of ii all is to get you to talk ultimately, to see how you feel about things so we get a little fix on you. Let me just ask you, Mr. Spence: I know you were asked this question, number fifty-six, about how you feel about the death penalty and wi only give you three lines there and you weren't given a great deal of time to ponder it. You've had three or four days now to mull it over in your mind. Let me just ask you if you would [3511] share with us, sir, your personal feelings about the death penalty and capital punishment. In other words, how do you feel about it and then, secondly, if you feel you would be able to serve on this type of a case and actually render a decision that would result in the execution of another individual?

A I feel that there are crimes that warrant death, sometimes would. As far as being able to serve on this jury, I believe ultimately I feel—I have to tell you up front that it probably wouldn't be an easy thing for me to do.

Q I understand that.

A But I understand that the law provides for such penalties in some cases and I believe in my heart that they're justified in some cases. Yes, I believe I could serve on it,

Q Your feelings about the death penalty, do you feel that the death penalty serves a particular purpose in our society?

A I think it serves two purposes. I believe one, it's a just penalty for some crimes and it shows others, who might be thinking of doing the same thing, what could happen to them.

Q What sorts of crimes comes to your

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[3503] GARY D. SPENCE,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows;

EXAMINATION

BY MR. MACALUSO;

Q Good afternoon, Mr. Spence. Let m begin by reintroducing most of the people who will be involved in this case. I'm Paul Macalus and to my immediate life is Jim Nelson.

MR. NELSON: Good afternoon.

Q Mr. Spence, once the trial actuall3 begins, we'll be joined by another lawyer. His name is Norman Kinne and he's not here, of course, right now. Mr. Kinne, Jim Nelson and myself are assistant criminal district attorneys here in Dallas. We work for Henry Wade who is the district attorney, I'm sure you know. He's designated us as the lawyers to represent the State of Texas in this particular case.

Now, to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are you Mr. Spence.

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[3525] A Okay. I understand what you're talking about. That's where the—

Q That's where the range of penalty comes in.

A It's not the range of the offense?

Q No.

A It's the range of penalty.

Q Now, the law says for murder, if a person is convicted of murder, the range of penalty is from five years in the penitentiary all the way up to ninety-nine years or life. Like I said earlier, Mr. Spence, all the law requires for you to be a qualified juror on a murder case—we're talking about murder now—is that you, number one, tell us you will be able to follow the law. Can you do that?

A Yes, sir.

Q You followed the law in the rape case, didn't you?

A Yes, I did.

Q All right. The second part of it is, that you will keep an open mind. You will listen to all of the evidence, if you were a juror on a murder case, and wait until you've [3526] heard every last bit of evidence before you 2 decide what the proper penalty ought to be. Fair enough?

A That's fair enough.

Q Okay. I mean, you're not the type of person, are you, sir, who will prejudge anything before you've heard all the evidence, are you?

A Not knowingly.

Q What I'm getting at is, when you make decisions, certainly important decisions, I gather you, like everybody else, are going to want to hear all of the facts before you make a decision?

A I believe in a case like this, I would want to hear all the facts.

Q And the law expects that a qualified juror will just keep an open mind, wait until you've heard all of the facts. Certainly you've heard no facts about any murder case yet, have you? You've heard no evidence?

A No, sir.

Q All right. Number one, you will follow the law, you will keep an open mind, [3527] isn't that right, and wait until you've heard all of the fact and then decide, after you've heard all the facts in a murder case, what you, Mr. Spence, feel is the proper sentence for the fact situation surrounding this murder. Am I making myself clear?

A Yes.

Q All right. In other words, if you hear a fact situation to your way of thinking, only after you've heard all of the evidence, that you feel calls for the—calls of it or warrants it and justifies the maximum, you will give the maximum, if you feel that's the right think and the proper thing to do? Fair enough?

A Right.

Q On the other hand, after listening to the evidence in a murder case, wait until you've heard every last stick of evidence, if you feel it is warranted, justified and calls for—in other words, it's the right and proper thing to do give the minimum, you will give the minimum? Fair enough?

A Right.

Q In other words, it's like the old cliché, you tailor the punishment to fit the [3528] crime, but you can't tailor any punishment until you hear the facts about the crime, can you?

A No.

Q And you haven't heard anything yet, have you?

A No.

Q Now, there are a couple of important things I want to discuss with you in that regard. As you sit there now, Mr. Spence, the law does not expect you to be able to think in your own mind of a fact situation or, in other words, a murder where you would say, yeah, I could give ninety-years or life and a $10,000.00 fine for this situation that I've got in my mind. Do you see? The law doesn't expect you to think of a situation like that. The law, likewise, does not expect you to be able to sit there and think of a situation where, yeah, I've got a situation in my mind where I could give as low as five years for murder. Do you see? The law doesn't expect you to do that.

All the law requires and expects f you is this, what I said before, to keep an [3529] open mind and don't prejudge anything because you haven't heard any facts yet. Wait until you have heard all of the evidence and then, if you see a case that calls for, warrants and justifies the maximum, you give that. If you see a case to your way of thinking where it is proper to give, under the facts, the minimum, tell us that you would be able to actually consider and vote for the minimum. Can you do that?

A Yes.

Q Now, you understand that it may be difficult to give either the maximum or the minimum. It might take real special facts. Can you agree?

A Yes.

Q In other words, you're going to have to hear something real bad before you give the maximum; would that be fair to say?

A Yes.

Q And you would probably have to hear some real special facts before you would give the minimum. Do you see what I'm getting at?

A Right.

[3530] Q It may be a rare occasion where you would give either the maximum or the minimum. You feel that you ought to set the punishment somewhere in between and the law allows you to do that. If you want to give seven years, ten years, twenty-five years, fifty years, you could give that, too. Do you see what I'm getting at?

A Yes, but I've got one question.

Q Sure.

A Didn't you tell me a while ago there are only two that you could—this particular case has?

Q No. We're just talking about murder. We're not talking about capital murder. We'll talk about that in just a second. When we're talking about murder, it's from five years all the way up to ninety-nine years or life or anywhere in between. Now, what it boils down to is this, Mr. Spence:

Do you feel you're the type of open-minded person who will follow the law and, if you hear a fact situation in a murder case that you feel warrants, justifies and calls for the maximum—and you know that's ninety-nine [3531] years or life. If you feel it's proper after you've heard the evidence, could you return a verdict of ninety-nine years or life for murder?

A Yes, I could.

Q All right. Do you see the other side? Are you the type of person who is fair-minded and open-minded and can follow the law and, if you heard a fact situation that, once you've heard all of the evidence, calls for, warrants and justifies the minimum of five years in the Texas Department of Corrections because you feel it's the right thing and the proper thing to do after you've heard the evidence, could you do that as well?

A Five years doesn't seem right to me for murder.

Q All right. Now, let's cover that for just a second. No one is saying you have to give five years in every murder case. No one is saying you will ever necessarily give five years in a murder case. Mr. Spence, theoretically you could be on a hundred different murder cases and never give one. For example, never hear facts that satisfy you that [3532] you should ever give ninety-nine years or life because you just don't ever hear the type of facts that you feel are proper for ninety-nine years or life; would you agree with me?

A I agree.

Q You know, you just may never hear—you may hear some that call for fifty years. You may hear some that call for twenty years and you may hear some that you think call for seventy-five, but you may never hear, if you're on a hundred cases—all you have to do to be qualified is tell us, if you hear a case, whether you can think of it now or not, you're the type of person who is open-minded enough to say, well, I'm not saying what I will do, but if I hear a case that I think calls for life or ninety-nine years and a $10,000.00 fine, I'll give it. I believe you said you could do that; is that right?

A I could do that.

Q They may be few and far between, would you agree with me?

A Yeah, I agree with you. I think I could do that if it warrants it.

Q Right, The same thing would hold [3533] true of the minimum. The type of case and the type of facts in a murder

that may call for five years may be few and far between, would you agree with me in that regard?

A I think it would be. I can't think of anything right now.

Q That's the whole thing. Don't be thinking of it, All you have to do is to be able to tell us this: If you, that is Mr. Spence, heard a fact situation where you think it's the right thing to do, whether you can think of it now, if you think after you've heard the facts of the case—you say, I never thought I'd see it. I never thought I'd see it, but here they are. These facts, to me, call for the minimum. If the minimum is five years, even though I never thought I'd see it, this is the case, one in a million, one in a hundred, one in fifty—but if you see it and you think it's justified, would you return a sentence of five years?

A If I thought it was justified, I would if that's following the law.

Q That's right and that's all the law is asking. That's all we're asking, that [3534] you follow the law and just tell us you have an open mind and you haven't closed your mind, have you?

A No, I haven't.

Q You haven't said—

A No, I haven't done that, but something would have to be justified in my mind.

Q Of course, and so would a ninety-nine year or life sentence, wouldn't it?

A Yes.

Q And a fifty year sentence would have to be justified, too, wouldn't it?

A Right.

Q Or a twenty-five year sentence?

A Yes.

Q In other words, either extreme I think everyone would agree that it would take special facts and you're not going to see them in every case?

A I wouldn't think so.

Q But if you see a five year case, you would vote for five years, wouldn't you?

A If I saw it.

Q You haven't closed your mind to [3535] that possibility, have you?

A No.

Q It may be a tough case to warrant five years, but if you see it, you'll give it, won't you?

A If I see it.

Q If you see a case that calls for ninety-nine years or life, you'll give that as well?

A If I see it.

Q Now, while we're on the subject of murder, let's talk about one other thing here. The instructions that the Judge will actually give you to govern your deliberations, he will probably talk to you about the laws of parole. Everyone knows that people are paroled or eligible for parole under certain conditions for any type of an offense sooner or later.

This is kind of an unusual situation, Mr. Spence, but basically what happens here is, the law actually tells you about that any sentence that is assessed in any type of case basically and in a murder case certainly is subject to the law of parole. The Judge would actually give you instructions that

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[3666] MILDRED C. PINCUS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. Pincus. As I was introduced to you yesterday, my name is Jim Nelson. The gentlemen who is going to be in here in just a minute is Mr. Paul Macaluso and I think the Judge told you yesterday a third person who will be involved for the State of Texas is Mr. Norman Kinne. The three of us are assistant district attorneys here in Dallas and we've been assigned by Henry Wade, the elected district attorney, to handle this case for the State.

Seated next to me is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good morning.

Q He will probably be joined at some point by Mr. Royce West. Those two gentlemen are attorneys in Dallas who have been appointed

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[3669] The first thing I would like to ask you is, if you know any of the people in the courtroom or anyone else I've named, either personally or by reputation?

A No, sir.

Q Okay. Ms. Pincus, I feel like it is only fair to you that you understand our position in this trial, the position of the State of Texas. We are actively seeking the death penalty for that man sitting right down there, Thomas Joe Miller-El. We feel like we will be able to present to a jury of twelve people the type and the quality of evidence that will allow them to convict him of the offense of capital murder and the type and qualify of evidence that will allow the jury to answer three questions yes. If those three questions are answered yes, Judge McDowell has absolutely no choice but to sentence that man sitting down at the end of the counsel table to die. That's all there is to it. Re has no options. Whether he agrees or disagrees with the jury's verdict, the jury's verdict is the final say.

We anticipate at some point that [3670] sentence, if the evidence comes out as we expect it to, will be carried out and Thomas Joe Miller-El will die as a result of the verdict in this case.

Now, you had a chance yesterday to fill out a questionnaire. It was rather lengthy and you didn't have a whole lot of time to think about it and I know you had other things on your mind at the same time. You've had a chance overnight now to think about it a little bit more, so I would like to ask you, if you would, to tell us in your own words how you feel about the death penalty and secondly how you feel about your ability to sit as a juror on this type of case?

A Well, I've always felt like—there are a lot of instances where I feel like the death penalty is warranted. Not all that are asked for, do I feel like are, but I feel like there are a lot of them that are sitting there on death row right now that should have been executed. I really do because I feel like all the avenues that are available to any of us in that situation have been exhausted. There are some crimes that I really feel very

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[3677] CAROL B. KING,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Ms. Ring. Let me reintroduce everyone here. I'm Paul Macaluso and this is Jim Nelson. When the trial begins, we will be joined by Norman Kinne. The three of us are assistant criminal district attorneys and we work for Henry Wade who, I'm sure you know, is the district attorney here in Dallas.

To Jim's immediate left is Brice Cunningham.

MR. CUNNINGHAM: Good morning.

Q I expect before too long he will be joined by another lawyer who was introduced to you yesterday, a tall man by the name of Royce West. They are the defense attorneys who have been appointed by the Court to represent the man charged with capital murder. He is the Defendant and his name is Thomas Joe Miller-El.

* * * *

[3679] want to ask, Ms. King, by all means ask it, all right?

A Okay.

Q Don't be bashful. If there is something you want to tell us, chime in at any time. I don't mean to be corny, but your opinion is the most important opinion. Everyone here has heard me talk for five weeks and they're bored stiff. We want to hear you. All right?

A Fine.

Q We're seeking the death penalty in this case, Ms. King. I just want to let you know as we've let every other juror to this point know, We are actively seeking the death penalty in this case for Thomas Joe Miller-El. What that means basically is, we know that the law allows for the death penalty in Texas under certain facts and certain circumstances and we intend, once the trial begins, to provide the jury with the type and quality of evidence that will convince them beyond any reasonable doubt that he's guilty just exactly as he's been charged. That's done in the first part of the trial.

[3680] In the second part of the trial, once again we intend to be able to provide the jury with the type and the quality of evidence that is going to convince them beyond any reasonable doubt that these questions should be answered yes. You know the effect of all yes answers is an automatic sentence of death?

A Yes, sir.

Q Now, everyone has an opinion. We have our opinions based on the evidence, but what is really going to count obviously is your opinion if you're on this jury. Without any further—let me just ask you, Ms. King, would you share with us your personal feelings about the death penalty? How do you personally feel about capital punishment and the death penalty and then secondly, do you know of any reason why you could not serve on a jury of this type and actually render a decision in this case that might result in the execution of Mr. Miller-El?

A Okay. Number one, I am in favor of the availability of the death penalty. I do not know of any reason why I could not render a decision assuming that the answers are yes.

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[3702] A Yes.

Q You can consider all of the evidence that you used in convicting an individual to decide whether or not these questions should be answered yes and if you do, you answer them yes. It doesn't happen automatically, though. Do you understand that?

A Yes.

Q Could you do that?

A I think so.

Q I forgot to get into something with you. You know that capital murder in Texas is a very, very special type of murder. It's only for capital murder in Texas that you can receive the death penalty. Do you understand that?

A Yes.

Q There is an offense called murder. I'm sure you know that. It's just called murder. It has a very, very broad range of penalty. It's from five years to ninety-nine years or life. The law sets out that range of punishment for murder to

encompass the infinite number of circumstances under which one person can commit murder, but you can't receive the [3703] death penalty for murder itself.

Now, murder is a situation where one person knowingly or intentionally—there's a legal definition that the Judge will give you for that term, knowingly or intentionally. They may be a little bit different than what you and I ordinarily would think those words mean. If one person knowingly or intentionally causes the death of another individual without any legal excuse or justification, that's murder. Now, there may be thousands of nonlegal justifications or excuses, but it doesn't excuse it because it's not a legal excuse. It doesn't justify it because it's not a legal justification, but you know as well as I do that there may be many factual situations that mitigate or aggravate a killing, a murder. Do you see what I'm getting at?

A Yes.

Q Now, an example of a legal excuse or legal justification would be self-defense. If you believe someone committed a homicide, that it was in self-defense, that's not murder. If you believe someone killed accidentally or [3704] someone was killed accidentally, it's not murder. If you believe someone was insane, it's not murder. If you believe someone acted in the heat of passion, it's not murder.

Now, let me shift gears here for a second. Let's go up to what capital murder is. If you commit murder as I've described it and you commit murder under certain circumstances, then it's possible to get only the death penalty or a life sentence only. You see then, under those circumstances, murder becomes a very, very special type. It must be a murder of a police officer, fireman, jail guard, murder while escaping from a penal institution, murder for hire, mass murder or, as we've set out here, murder in conjunction with another very serious offense such as rape, robbery, burglary, arson or kidnapping.

Let me just ask you, those types of murder that I've set out, killing a police officer and so forth or murder plus, do those strike you generally speaking of the types of offenses that you feel the death penalty should be warranted depending upon the facts and circumstances?

[3705] A Yes.

Q Now, we talked about murder and we talked about capital murder. The Defendant, of course, is charged in this case with murder—we've alleged murder plus, murder during a robbery. I gather from what you said that you believe, depending upon the facts and the background, that's the type of case in which a person should receive the death penalty depending upon the evidence; is that correct?

A Yes.

Q Now, let's shift gears back to what I was talking about, murder. Let's say you're on a jury and let's say that the State has alleged a capital murder. We've alleged a murder during a rape. That's a type of capital murder, If we expect you as a juror to find that individual guilty of capital murder, we have to prove both the murder and the rape. Do you understand that?

A Right.

Q Let's say you're on that jury and you don't have a doubt whatsoever that the murder occurred, but let's say you don't believe that—you didn't hear any testimony [3706] about a rape or you have a reasonable doubt that it was during a rape. Do you understand, if that were the situation, you would have to find that defendant not guilty of capital murder because we didn't prove the rape part of it. You would find him guilty of what we did prove, which is what?

A Murder.

Q Murder. If that were to happen, then you forget all about automatic life or automatic death or capital murder. Do you understand that?

A Yes.

Q I didn't mean to say automatic mean mandatory life or mandatory death. Instead you find the defendant guilty of murder and, you know, we have that very, very broad range of penalty. All the law expects of you in a situation like that, Ms. King, is, number one, you follow the law. I believe you said you could do that without a doubt. Whatever the law is, you will follow it. Number two, keep an open mind as to the full range of penalty, in other words not prejudge anything. In other words, sit over there as a juror, if [3707] you were on a murder case, and just tell us that you will follow the law you will wait and listen until you hear all of the evidence before you make up your mind on what the proper penalty should be. That's what the law expects of you because, you see, they gae you that very broad range of penalty to allow you to tailor basically, once you've heard all the evidence andall the background information, the relationship between the parties, what you learn about the defendant, what you learn about the victim, their backgrounds, their relationship, all these things—do you see what I'm getting at?

A Right.

Q Because the law allows you properly to take into consideration—as the old clichéd goes—you've been around a criminal practice—tailor the punishment to fit the crime one you've heard the evidence. So Ms. King is sitting on the jury in a murder case, you know what the law is, five years to ninety-nine years or life and an optional $10,000.00 fine, and you're the type of person who can keep an open mind and wait until you've [3708] heard all of the evidence and then, if youdecide the right thing to do, the proper thing to do and the just thing to do based on the evidence is to give the maximum, you'll give the maximum after you've heard all the evidence. Can you do that?

A Yes.

Q By the same token—you're the same type of person who will follow the law and you know the range of penalty—

if you heard a case to your way of thinking after you've heard all the evidence—and you haven't heard any thus far, have you?

A No.

Q If you hear a case that calls for, warrants, and justifies, and it's the proper and the right thing to do to give the minimum, you will give the minimum whatever it is?

A I can do it.

Q In other words, knowing that the minimum is five years, you could do that?

A Yes.

Q If a proper case calls for ninety-nine years or life and an optional $10,000.00 fine and you think that's the right thing to do [3709] based on the evidence and the proper thing to do, can you do that as well?

A Yes.

Q And anywhere in between?

A Yes.

Q Now, you understand that you're not required as you sit there to think of a situation where you would give ninety—nine years or life or imagine a situation where you would give five years. You've just got to be able to say, if I see it, I'm the type of person who will give it. I may not be able to think of it, but I'll give it.

One little thing here I want to talk about briefly is the parole law. This is kind of art unusual situation. Everyone knows that parole exists for any type of crime whether it be murder, burglary, whatever the case may be. The Judge would actually give you an instruction as to the parole law. It's kind of an unusual thing because he would tell you that any sentence you impose is subject to parole and it's subject to consideration of good-time. In other words, a person could be discharged early. He will give you all these

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[3744] CHARLOTTE WHALEY,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. Whaley. As I was introduced to you yesterday, my name is Jim Nelson. The gentleman seated next to me is Paul Macaluso. I think the Judge told you yesterday that there will be a third gentleman involved and his name is Norman Kinne. The three of us are assistant district attorneys here in Dallas who have been assigned by Henry Wade to handle this case for the State of Texas.

The person immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good morning. How are you?

MS. WHALEY: Fine.

Q Next to him is Mr. Royce West. These two gentlemen are attorneys in Dallas and they have been appointed by Judge McDowell to

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Q Okay. Ms. Whaley, I'm going to start out by telling you basically what our position is, that being the State of Texas. We are actively seeking the death penalty for Thomas Joe Miller-El. We feel we will be able to present to a jury the type and quality of evidence to allow them to convict him of the offense of capital murder. We know the law allows for the death penalty and we intend to present to the jury the type and qualify of evidence that will allow them to answer three questions yes. If those three questions are answered yes, then the death penalty is automatically assessed by Judge McDowell. He has no options. He has no discretion in the

matter. He must assess the death penalty if those questions are answered yes. That's basically where we are and what we're attempting to do and planning to do.

You filled out a questionnaire yesterday morning which was fairly detailed and you had to do it somewhat of a hurry I would guess under the circumstances. One of those questions, number fifty-six, involved your feelings about the death penalty and you [3748] answered that question. I would like to ask you, if you would, now that you've had a chance to sleep on it and think about it some more to tell us in your own words, first of all, how you feel about the death penalty and whether it serves a purpose and, secondly, how you feel about your ability to serve on this type of a jury?

A Well, as you know I circled both yes and no. I suppose I feel that the death penalty should be the very last resort. It would have to be a very clear-cut case where it was premeditation, obvious premeditation, and a very deliberate and cold-blooded act.

Q Do you feel then that the death penalty in some circumstances serves a purpose in our society?

A Yes, I do. I think it would keep someone from doing it again, protects society.

Q Do you feel like you're the type of person who can serve on a jury where the death penalty is one of the potential punishments?

A Again, it would depend on the circumstances. I think I could make the

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[3782] the death penalty should be the last resort. Is that your strong feeling?

A Yes, it is.

Q Okay. If it appears as though a person is capable of rehabilitation, then that should be an option; is that correct?

A Yes.

Q Ms. Whaley, do you have any questions of me?
A No, sir.
Q Have you understood everything that both sides have said?
A Yes, I have.
Q Thank you for being very patient.

MR. WEST: Pass the juror.

THE COURT: Mr. Nelson, what says the State?

MR. NELSON: May we have just a moment?

THE COURT: Surely.

MR. NELSON: The State will excuse Ms. Whaley.

THE COURT: Thank you, Mr. Nelson. Ms. Whaley, you will be excused from service. We really

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[3784] CATHERINE C. BARNARD,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Ms. Barnard, as I was introduced to you yesterday, my name is Jim Nelson. The rest of these people were introduced to you, but let me go through it again just real quick. Sitting next to me is Paul Macaluso. There will be one other prosecutor involved in this and his name is Norman Kinne. He will be presenting the evidence for the State of Texas. We're all three assistant district attorneys here in Dallas and we've been assigned by Henry Wade to handle this case for the State of Texas.

This is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are you this afternoon?

Q Sitting next to him is Mr. Royce West.

MR. WEST: Good afternoon,

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[3786] anything. We're just basically trying to find out how you feel about certain issued that may or may not come up in this case. The Judge gave you an idea of what some of those are going to be when we talked yesterday.

I feel, Ms. Barnard, like I ought to tell you right off the bat what our position is. The State of Texas is actively seeking the death penalty for Thomas Joe Miller-El in this case. We feel that we will be able to present to twelve jurors the type and quality of evidence to allow them to convict him of the offense of capital murder and the type and qualify of evidence that will allow them to answer three questions yes. If those three questions are answered yes, he gets the death penalty from Judge McDowell. Judge McDowell has no discretion and no options. The jury makes the decision and Judge McDowell just carries out that decision. That's basically how it works.

You had a chance yesterday to fill out a questionnaire. It was on kind of short notice, but one of the questions on there, number fifty-six, had to do with your feelings [3787] about the death penalty. Now that you've had a chance to sleep on it and think about it a little bit more, would you tell us please, in your own words, what your feelings are about the death penalty and whether it serves a purpose in society?

A I'm not against it, I don't know how to explain to you, but I think I could—
Q Do you feel like the death penalty serves a purpose in our society?
A I think it should.

Q Some people come in here and say, well, it's a deterrent factor. If people know it's there, maybe it will keep them from committing other crimes. Would you believe that might be the case?

A Yes.

Q Okay. Ms. Barnard, you're married; is that right?

A Uh-huh.

Q Would you hazard a guess as to how your husband feels about the death penalty, or do you know?

A I know. He's for it.

Q Now, Ms. Barnard, I want to talk

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[3801] more of those questions could be answered no. You may answer, and may be required to answer them, based on the facts that you heard on the first phase of the trial, but those facts may say to answer them no or they may say answer them yes. We don't know at this point what they're going to say to you, Ms. Barnard, but what we need to know from you is, assuming you've found this person guilty of capital murder, can you still answer those questions either yes or no based on what the evidence shows you?

A Yes.

Q It's not an automatic yes because the defendant has been found guilty and it's not an automatic no because he's been found guilty. You have to look at the evidence. Any problem with that?

A No.

Q Let me talk about one other thing that may come up. We don't anticipate that it will, but it might. We call this murder plus. Let's take a different situation, murder p]us a burglary; for example. Say you're a juror on that case and you hear the testimony and the [3802] evidence and everybody has rested and closed, but all you've heard about is the murder. We've proved to you that the defendant knowingly or intentionally caused the death of another individual, but we

haven't proved anything about a burglary. You didn't heard a word one about a burglary. We haven't proved capital murder, have we? We've just proved murder.

A Yes.

Q That's a lesser included offense of capital murder. Regular murder in the State of Texas does not carry the potential of the death penalty. It has the widest range of punishment of any criminal offense in the state, anywhere from five years up to ninety-nine years or life and an optional fine of up to $10,000.00. We talked a few minutes ago about self-defense. Self-defense is a legal justification for killing someone. If you find by a preponderance of the evidence, that it was self-defense, then it your duty to find that person not guilty. If it was an accident, that person is not guilty of murder. If they were insane at the time, they're not guilty o [3803] murder. If it was a killing in the heat of passion—if I came home one day and my little four year old girl had been raped—

MR. CUNNINGHAM: Your Honor, again we will object to giving an actual situation.

THE COURT: I'll overrule in this situation.

MR. CUNNINGHAM: Note our exception.

Q —and the guy that did it was standing two houses down laughing about what he did to my little four year old girl, if I went down there and killed him, the jury might find that was a killing in the heat of passion, but that's not murder. That's voluntary manslaughter which is a different grade of offense with a different range of punishment. When we talk about murder, we talk about the knowing or intentional taking of another human life without any legal justification or without any legal excuse whatsoever. He knew he was going to kill him. He intended to kill him and he killed him without any legal justification or excuse.

[3804] The legislature gave us a wide range of punishment

for a reason. Would you agree with me that there is —the word I like to use is—a myriad of circumstances under which murder can occur, those things we talked about a few minutes ago, prior relationship of the parties, actions of the parties. Third parties could be involved. It could be years and years of things building up. It could be a sudden situation. I suppose that, if we sat here the rest of the afternoon and into the evening, we could give you nonstop examples of different situations which would be murder. They are all the knowing or intentional killing of another human being without any legal justification or any legal excuse, but there may be justification or excuses that don't amount to legal justification or excuses, just like there may be provocation that doesn't amount to self-defense, but it's still something the jury can consider.

In order for you to be qualified to serve on this jury, you have to be able to tell us and tell the defense that you can keep an open mind as to that entire range of [3805] punishment. Again, you don't have to be able to sit there right now and say I'll give life, anymore than you have to be able to sit there right now and say I'll give five years, because you don't know the facts. You don't know what the facts are going to show about the case or the people involved or the defendant, for that matter, if anything. We have to know from you that you will keep an open mind and listen to all of the evidence before you make a decision. Can you do that?

A Yes.

Q Okay. You don't have to be able to envision at this point, Ms. Barnard, a case where you would give a life sentence. You don't have to be able to envision a case where you could give a five year sentence, You don't have to be able to envision a case that you would give anything in between. As a matter of fact, the law does not want you trying to think of what would justify a five year sentence or what would justify a life sentence because the law wants you to

keep an open mind as to the evidence. But what we do need to know is whether you can consider the entire range of [3806] punishment. Now, can consider, I guess, is a phrase, at least in this context, that is a legal type of phrase. It basically means, if you convicted someone of murder, you've heard all the facts and circumstances, everything about the crime, the people involved, the defendant, everything you're going to know, if after you've heard all of that, you feel like the facts and the circumstances call for and justify a sentence of life and a fine of $10,000.00, could you give that?

A Yes.

Q Let's go to the other end. Again, you've convicted someone of knowingly or intentionally causing the death of another human being without any legal justification or without any legal excuse. He intended to kill him, knew they were going to kill them, and killed them. It's not capita] murder though, it's just murder. You've heard all the facts and circumstances about the case, about the defendant, about the other people involved. If after you've heard all that, you feel in your mind that those facts and circumstances call for and justify a five year sentence for the [3807] offense of murder, could you give that?

A Yes.

Q Do you have any problem with that?

A No.

Q Do you feel like you could keep an open mind as to the entire range of punishment?

A I think so.

Q If the facts called for life, you could give life?

A Yes.

Q If they called for five years, you could give five years? If they called for twenty-seven and a half years, you could give twenty-seven and a half years?

A Yes.

Q Any problem with that at all?

A I can't think of any.

Q All we're asking you to do, Ms. Barnard, is just keep an open mind and listen to all of the evidence before you make a decision and do whatever the facts and circumstances justify to you, whatever that may take. It may be one in a million that would call for a life sentence in your mind and maybe there should be one in a million, but if you [3808] see that one in a million case, you would give life or if you see the one in a million case that called for five years, you would give five years.

Now, we have people say I can't imagine. There's no way I could ever imagine a case that called for five years andyou may think that four years from now, if you're sitting on a jury. I never thought I'd see it, but there it is. If it calls for five years, you give five years.

There is one more thing that enters into that. You probably have heard of parole. The law says and the Judge may instruct you that a person sentence to the Texas Department of Corrections can get credit for what is called good-time against their sentence or they may be paroled early. The law also says that that is under the exclusive jurisdiction of the Board of Pardons and Paroles and the governor. We can't control it. You can't control it and neither can Judge McDowell control it. So knowing all that, the law says, okay, you know this and it exists, but you can't control it so you can't consider

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[3884] argumentative or cross-examining you.

SUSAN K. PAGE,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. Page. As you may remember from Monday, my name is Jim Nelson. The man seated next to me here is Mr. Paul Macaluso. There will be one other gentleman involved for the State of Texas in this case and his name it Norman Kinne. Mr. Kinne is not here today, but will be when we start representing evidence in this case.

The man immediately to my left is E. Brice Cunningham.

MR. CUNNINGHAM: How are you .this morning, Ms. Page?

Q Sitting next to him is Mr. Royce West.

MR. WEST: Ms. Page, good morning.

* * * *

[3886] relax and remember that there are no right or wrong answers to anything anyone is going to ask you and nobody is going to argue with you or-try to change your mind. We're just going to try to find out how you feel about these things. This is our fifth week of jury selection and we have eight jurors. It's a little bit tedious and it takes some time and there are some issues. that people have very deep feelings about and that's what we're trying to find out. If you will just bear with us and be as open and as honest as you can with us, then that will help us a great deal.

If you have any questions or if I get to talking too fast or if I don't make myself clear, please stop me and we'll get things

cleared up because I want to be sure that we understand each other by the time we're finished here.

The position of the State of Texas in this case, Ms. Page, is that we are actively seeking the death penalty for Thomas Joe Miller-E1. We know that the law allows for it in this type of case and we believe we can present to a jury the type and the quality of [3887] evidence to allow them to convict him of the offense of capital murder and then to allow a jury to answer three questions yes.

If those three questions are answered yes, then Judge McDowell has no choice but to assess the death sentence in this case. He has no options, no discretion in the matter. He must assess the death sentence if all those questions are answered yes. If those questions are answered no, he must assess a life sentence. We'll talk more about that in a few minutes.

That being our position, that doesn't make a whole lot of difference. What counts is your feelings about some things. You had a chance on Monday on rather short notice to fill out a questionnaire. One of the questions on there was about the death penalty and you answered it fairly completely, but you've had a couple of days to sleep on it and think about it. I would like to ask you, if you would, to tell us in your own words, first of all, how you feel about the death penalty and whether it serves a purpose in our society?

A I do believe in the death penalty,

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[3904] A Yes.

Q Let me shift gears just a little bit and talk about something that we don't anticipate will happen in this case, but it's a possibility so I want to talk about it. You remember that we called this murder plus. We have to prove murder plus another offense. Let's say, for example, a murder in-the course of a burglary. You're sitting on the jury. We present

the evidence and we prove to you the murder part of it. We prove that the defendant knowingly or intentionally caused the death of another human being, but you don't hear a word one about a burglary, no evidence at all that there was a burglary committed at the same time. We haven't proved capital murder at that point then, have we?

A No.

Q We've just proved murder. Murder in the State of Texas does not carry the possibility of the death penalty. It's the broadest range of punishment of any offense in the State of Texas, anywhere from five years up to ninety-nine years or life and a fine of up to $10,000.00, but death is not an option. You [3905] mentioned self-defense before. If a jury finds that it was self-defense, that's not murder. He's not guilty. If a jury finds that it was an accident, it's not murder. He's not guilty. If he's insane, he's not guilty. if it is a killing in the heat of passion—if I came home one night and saw my little four year old girl had been raped and abused and the guy that did it is standing two houses down laughing and telling everybody about it and I take my gun and go down there and blow him away, the jury might find that was a killing in the heat of passion. That's not murder. That's what we call voluntary manslaughter.

When we talk about murder, Ms. Page, we're talking about knowingly or intentionally causing the death of another human being without any legal justification like self-defense or without any legal excuse like insanity. I emphasize legal justification and legal excuse.

I suppose, if we sat here for the rest of the day, that the four of us could give you examples of different types of murders until it got dark tonight and not run out of [3906] them. They are probably a myriad of circumstances under which one person could murder another person. As you mentioned yourself, there may be provocations that don't amount to self-defense, but they is still provocation there. There may be a

prior relationship between the parties and you could hear about that. Third persons involved, you can hear about that. All the circumstances of a murder case, you can hear about in a murder case.

In order for you to be qualified to serve on a jury, you have to be able to tell us that you can consider the entire range of punishment. When I say consider, I don't mean that you have to tell us right now, yes, I'll give five years or, yes, I'll give ninety-nine years or I'll give forty-three years because you haven't heard the facts. You don't know what the facts are at this point so you can't tell us that. As a matter of fact, you don't even have to be able to envision in your mind a set of facts and circumstances that would cause you to give life or would cause you to give five years. What we need to know from you, Ms. [3907] Page, after you've heard all the evidence and all the facts and circumstances, everything you're going to know about the case, about the defendant and everything else involved, after you've heard all of that, if you believe that a life sentence is called for and justified by those facts and circumstances as you heard them, can you give a life sentence?

A Yes, I could.

Q Let's go to the other end. Again, you've convicted someone of knowingly or intentionally causing the death of another human being without any legal justification and without any legal excuse, you've heard all the facts and circumstances of the case. You know everything about the murder, about the defendant and everything you're going to know. After you've heard all of that, if you believe a five year sentence is justified by the facts and circumstances, can you give a five year sentence?

A Yes, I could.

Q And you can give anything in between depending on what the facts call for; is that right?

[3908] A Yes, sir.

Q Again, all we're asking you to do, Ms. Page, is keep an open mind as to the entire range of punishment and after you've heard all of the evidence, if you feel five years is justified, give five years. If you feel life is justified, give life. If you think twenty-three point eight seven years is justified, then give that, whatever you feel is appropriate in your mind. You don't even have to be able to sit there right now and think of a set of circumstances that would justify those. As matter of fact, the law doesn't want you to because the law doesn't want you saying what has to be this for me to give five years. They just want you to be able to say, if you hear that five year case, even though it may be one in a million and you may think you'll never hear it, but you're sitting here in twenty years on another murder jury and you say, well, I never thought I'd hear it, but this is the five year case, you'll give five years. Do you feel like you can do that?

A Yes.

Q Even though you've told us how you [3909] feel about murder and giving people the death penalty for killing another human being and that kind of thing, you can follow the law; is that right?

A That's right.

Q And if it's murder consider five years up to life and, if it's capital murder, make a decision on those questions all the time based on the evidence; is that right?

A Yes.

Q Any problem with that at all?

A No.

Q Let me mention on-e other thing while I'm thinking about it. You have probably heard of parole. The Judge may give you an instruction that says a person who is sentenced to the penitentiary may receive good-time credit based on his conduct in the penitentiary. By the same token,* a person may be paroled from the penitentiary before his actual calendar sentence is completed, but the law goes on to say that you can't concern yourself with that because that is in the

exclusive jurisdiction of the Board of Pardons and Paroles and the governor. You can't

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[3942] JANICE MACKEY,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Let me begin by reintroducing most everyone that will be involved directly in this case. As you may recall, I'm Paul Macaluso. This is Jim Nelson and we will be joined by another lawyer whose name is Norman Kinne. He's not here now. We're all assistant district attorneys and we work for the DA's office in Dallas and we've been designated as the lawyers to represent the State in this case.

Now, to Jim's immediate left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good morning, Ms. Mackey.

Q Momentarily, he will be joined by Mr. Royce West. They're the defense attorneys, I'm sure you recall, who were introduced the other day along with us. They are the lawyers

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[3946] other words. You just tell us how you honestly feel and, like I said, you will be doing your job. Furthermore, Ms. Mackey, if you have a question about anything, okay, don't be bashful, ask the question. If there is something that you need to tell us that we don't touch on, that you feel is important, than by all means, in fairness to everybody, just let us know.

Let me tell you what our position is in this particular case, that is the State of Texas. Ms. Mackey, we are actively

seeking the death penalty in this case for Thomas Joe Miller-E1. We know that the law allows for it. The Judge told you that. The law does allow a person convicted of capital murder to receive potentially the death penalty. We are actively seeking it. What it boils down to is this: We intend to provide a jury with the type and quality of evidence at the end of the trial that will cause them, under the law, to find the Defendant guilty of capital murder just .exactly as he is charged in this indictment. That's the first step and that's done in the first part of the trial.

[3947] Then in the second part of the trial, we intend to provide that jury with the same type and quality of evidence that will convince them beyond any reasonable doubt that the questions that the Judge would submit to you should be answered-yes beyond any reasonable doubt, which will automatically result in Judge McDowell sentencing Thomas Joe Miller-E1 to be executed. What that means is in the legal process of things, after the pronouncement of sentence by Judge McDowell, the Defendant, after legal processes have been continued, would be taken down to the Texas Department of Corrections. He will be placed on death row and at such a time as designated by law, he would be taken to, what we call, the death house and at a particular time he would be placed on a gurney—do you know what a gurney is?

A Yes.

Q He would be taken to the death house and have what basically amounts to a needle inserted into his arm and then, under the law, a lethal substance, in other words a poisonous substance, would be placed in his [3948] body. Enough of it would be placed in there to cause his death. In other words, I don't mean to by gory about this thing and I don't mean to try and frighten you, but I just want to bring home the seriousness of what we're about here and what we're ultimately trying to do under the law. We're trying to kill Thomas Joe

Miller-El under the law. The law provides for it. That's what we're about here.

Now, I know that it might sound a little bit gory, but the reason I'm saying that is because we want you to have an accurate picture. We want all the jurors to have an accurate picture of just what the consequences are of this particular type of a trial. Now, as you well know—or as you may know—we are in our fifth week of jury selection. We have at this time eight jurors. You are prospective juror number one hundred, so you can see how laborious this process is and how long it takes. The whole idea of it all, as I said earlier, is to find out how you think and how you feel. Now, I' m doing—all the talking right now, out you can see that this type of a case where it involves the death penalty, [3949] people have strong feelings, obviously, one way or the other. Do you see what I'm getting at?

A Yes.

Q We want to know how you feel about it ultimately and I'm going to stop talking here in just a minute and let you tell us how you feel personally about the death penalty, for one, and capital punishment and then secondly, your ability to actually serve on this type of a jury or to not serve. You've been asked this question, number fifty-six, and you said "Thou shall not kill"; is that correct?

A That's correct.

Q That's the way you felt Monday when you came down here?

A Yes.

Q Is that the way you feel now?

A Yes.

Q Just tell us a little bit more, kind of in your own words, how you feel about the death penalty.

A Well, I don't believe a person has the right to say who should be killed and who shouldn't going by what the crime is. Like I

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[4022]follow the law. She's not an ideal juror from the State's standpoint. I'm aware of that, but I'm going to hold that she is qualified.

Based on that, what is your pleasure?

THE COURT: Whatever we do, I'm not going to start until —I'm going to recess until about 12:30. Why don't you sent the next juror to lunch, Bob?

MR. NELSON: We would like to put it on the record with the Court's permission that we are exercising a challenge because of what's been the subject of discussion with the Court for the last fifteen or twenty minutes, her reservations about the death penalty and her statements that she can't serve on this kind of jury and doesn't want any part of it and cannot give the death penalty or be part of anyone being

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[4028] BRENDA G. WALSH,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was' examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Ms. Walsh. As you may remember, my name is Jim Nelson and I'm an assistant district attorney here in Dallas. Sitting next to me is Mr. Paul Macaluso. There will be one other gentleman involved for the State in this case and his name is Norman Kinne. He will be presenting the evidence for the State of Texas. The three of us are assistant district attorneys who have been assigned by Henry Wade to handle this case for the State of Texas.

To my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Ms. Walsh?

Q Next to him is Mr. Royce West.

MR. WEST: Good afternoon, Ms. Walsh.

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[4039] might have.

Let me just start out by telling you what our position is in this case. The State of Texas is actively seeking the death penalty.for Thomas Joe Miller-E1. We know that the law allows for it and we feel like we will be able to present to a jury sufficient evidence to allow you to convict him of the offense of capital murder. We feel we will be able to present the type and quality of evidence that will allow the jury to answer three questions yes. If those three questions are answered yes, Judge McDowell has no choice under the law but to sentence that man sitting right down there in the light blue suit to die. he has no discretion whatsoever. The jury's verdict controls. I'll talk about the details of how it works in a little bit.

The first thing I would like to know is—you had a chance to fill out a questionnaire on Monday morning probably in a situation where if I were in your shoes, I would have still been reeling a little bit from finding out it was a capital murder case.

A Yes, sir.

[4040] Q I know you didn't have a lot of time to think about it, but you've had a couple of nights to sleep on it now. I would guess it was on your mind to at least some extent. Would you tell us now just in your own words how you feel about the death penalty and whether it serves a purpose in our society?

A Okay. I believe in capital punishment for certain crimes as the law describes. I know there are a lot of people who would disagree with me who don't feel like it should be the law, but that's not to be decided, as I understand from

what the Judge said, here. I think it does serve a purpose in certain cases. I do believe that sometimes there are extenuating circumstances that need to be considered. If all the evidence points to there being a conviction, then the jury really doesn't have a choice. But it's based on that evidence that you have to decide.

Q Okay. How long have you felt this way about capital punishment? Have you ever felt differently?

A No, sir, I can't say that I have.

Q Your mother is still alive; is

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[4056] got to get the death penalty. In that situation, if we failed to prove that one of those questions should be answered yes, the law still requires you to answer it no even knowing it would result in a life sentence rather than the death penalty. By the same token, if you hear the facts of the case and you say, well, this guy doesn't really deserve to die, I don't think he ought to die, yet we've proved that each of those should be answered yes, you're required to answer them yes knowing that it will result in the death penalty. Do you feel like you can do that?

A. Yes, sir. I do.

Q Do you feel like you can set your emotional feelings aside and base your answers to those questions on the evidence that you hear?

A I think those questions are going to be a great help.

Q Okay. If we prove those to you, you will answer them yes and, if we fail to, you will answer them no?

A Yes.

Q There's one thing that may come [4057] up. We don't expect it to, out it mignt. I told you that we call this murder plus. We have to prove the murder plus another offense. Let's take murder and a burglary, for example. You're sitting on the jury and we present our evidence and you hear all about the murder and you hear all about the killing, but there is not

a word about any burglary. We don't prove to you anything about a burglary. Then we haven't proved capital murder, have we?

A No, sir.

Q We've just proved murder. The offense of murder, alone, in the State of Texas does not carry the death penalty. It has a range of punishment of from five years up to ninety-nine years or life and a fine of up to $10,000.00, no death penalty. That's the widest range of punishment for any crime in the State of Texas. I guess that's there because of all the various circumstances under which a murder can occur. A murder is the knowing or intentional taking of another human life without any legal justification or without any legal excuse. For example, it you were on the jury and you decided that it was self-defense [4058] after you heard .the facts, the person is not guilty. It's not murder. If you hear the facts and decide it was an accident, he's not guilty. It's not a murder case. If you hear the facts and decide he was insane, he's not guilty. Again, it's not a murder case. Even if it was a killing in the heat of passion if I came home one night and my little four year old girl had been raped and abused and the guy who did it was standing two houses down with a beer in his hand bragging about it and I took my gun and went down there and blew him away, the jury might find that was a killing in the heat of passion. If it was, then that's not murder, either. It's voluntary manslaughter. Murder is the knowing or intentional taking of another human life without any legal justification or legal excuse.

Now, there could be provocation or excuses or reasons that enter into the situation that don't amount to legal justification or excuses or legal reasons. Do you see the distinction there?

A Yes, sir.

[4059] Q Okay. The law allows you to consider all those things before you assess a sentence. You can hear all the facts of the case. You can hear about the prior relationship between the parties. You can hear what led up to the killing. You can

hear if there was a third person involved. You can hear all about the person that did the killing, also. You can hear all those things. What the law asks you to do, Ms. Walsh, is keep an open mind as to what sentence you would give until you've heard all that evidence and to not close your mind to one end or the other. Therefore, for you to be qualified to serve on this jury, you have to be able to tell us that you have an open mind as to the entire range of punishment for the offense of murder, anywhere from five years up to ninety-nine years or life. If you hear a ninety-nine year case, you can give ninety-nine years. If you hear a five year case, you can give rive years.

The law doesn't even ask you to sit there right now and think if a situation where you would give ninety-nine years or think of a situation where you would give five years [4060] or a situation where you would give three years because the law does not want you making up your mind, well, this is what it's going to take for me to give a five year sentence. All the law says, if you hear a case that calls for a five year sentence, then you have to give. a five year sentence. The phrase the law uses is able to consider, are you able to consider the entire range of punishment. I guess what it comes down to, Ms. Walsh, is this: You've heard the facts and you've convicted someone of the offense-of murder, knowingly or intentionally killing another human being . without any legal justification or legal excuse. He did it. He knew he was going to do it. He intended to kill the person and he did it plus whatever other facts and circumstances may enter into it. After you've heard all the facts you're going to hear, all the extraneous circumstances, everything about the defendant you're going to hear, if you feel, based on those facts and circumstances, that a ninetynine year sentence or a life sentence is called for, would you and could you give that?

A Yes, sir.

[4061] Q Let's go to the other end. Again, you've convicted someone of knowingly or intentionally killing another human

being without any legal justification or without any legal excuse. You've heard all the facts and circumstances and after hearing all the facts and circumstances, you believe in your mind that those facts and circumstances call for a five year sentence, could you and would you give a five year sentence?

A Yes, sir.

Q If it calls for twenty-three years, would you give that?

A Whatever the law calls for.

Q Okay. Whatever the evidence calls for, whatever you believe in your mind and in your heart is the correct sentence, that's what you will give; is that right?

A That's correct.

Q You don't have your mind closed to five years or ninety-nine years or anything in between?

A No, sir.

Q There may even be a situation—I'll submit to you that it ought to be a special case to allow for a life sentence. It ought to be a [4062] special case to allow for a rive year sentence, the minimum. You may even sit up there and think, I'm never, ever going to hear a case that calls for five years. Thirty years from now you're sitting over here on a jury and you say, after hearing all the facts, I never thought I'd hear one, but here it is. This one calls for five years, so you give five years. That's all the law asks you to do. Do you have any problem with that at all?

A No, sir.

Q Let me mention one other thing while I'm on that subject. You probably heard some discussion of parole?

A Yes, sir.

Q The judge may instruct you and the law is, prisoners in the Texas Department of Corrections can get credit for what is called good-time for their conduct while they're down there. It can be credited against their sentence. They can also be paroled before their calendar sentence has been completely

served, but the law goes on to say that those types of things are under the exclusive

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[4102] PAUL BAILEY,

called as jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Bailey. Let me reintroduce everyone here briefly. I'm Paul Macaluso. This is Jim Nelson. We will be joined by another assistant district attorney once the trial itself begins. His name is Norman Rinne. We're the State's attorneys in this particular case.

To Jim's immediate left is sir. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Bailey?

MR. BAILEY: Fine. Thank you.

Q To his immediate left is Mr. Royce West.

MR. WEST: Mr. Bailey, good afternoon.

Q They're the defense attorneys and

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[4107] personal opinion, no one is going to quarrel with you or argue with you or try and change your mind and talk you into or out of anything. Just speak your mind and we'll respect your opinion and, like I said, you will be doing your job.

Let me tell you what our position is in this particular case. We are actively seeking in this case for Thomas Joe Miller-

E1 the death penalty. We know that the law allows for it under very special types of capital murder cases. We intend to be able to provide a jury—and we have nine people so far and we need three more. We intend to be able to provide this jury once it is selected—and that would mean you if you were on the jury-with the type and quality of evidence in the first part of the trial, the guilt or innocence part of the trial, to convince the jurors beyond any reasonable doubt that the Defendant, Thomas Joe Miller-E1, is guilty of capital murder just exactly as he has been indicted.

Then in the second part of the trial, once again we intend to be able to provide the jury—and that would mean you if [4108] you were on the jury—with the type and the quality of evidence that would convince them beyond any reasonable doubt whatsoever that those questions, and the questions determine death or life, should be answered yes. You know from what the Judge told you, three yes answers equals a mandatory sentence of death. That's our position based on the evidence.

You understand that ultimately it's the position of the jurors that counts, but we want you to know what our position is from the outset. It is our desire, based on the evidence and allowed for by law, that he be assessed that sentence of death which, as you know--and I don't mean to be gory about this, Mr. Bailey—that means death by lethal injection here in Texas. This is not something, of course, I think you realize, that you may be talking to someone about over coffee or reading about in the paper or hearing on the radio or on TV. You are in the middle of the situation where you may be called upon, if you can, to serve on a jury of this type and render a decision, if you can, that might result in your actually making a decision that would [4109] result in the execution of that man right down there. That is, at some point in time if the death penalty is returned, he will be taken down to Huntsville, Texas and at some point designated by law, a

particular time that is set up, he will be moved over to the death house and at some particular point in time, he will be taken out of the death house and placed on a gurney, taken into the death house itself where they is a procedure where they will put needle into his arm and inject him with a lethal substance sufficient to cause his death. That's the ungarnished truth of the matter. can talk about it, capital punishment, and call it all kinds of glossy things, but that will be the final result, we feel, based on the evidence in a case of this type, if the jury follows the law and follows the evidence we believe that we're going to be able to present during this trial. Do you see what I'm getting at?

A Yes, sir.

Q All right. So with all that long involved introduction out of the way, as I said earlier, the most important opinion, the most important decision, in this type of a very, [4110] very serious case where the stakes are as high as they are, is your opinion. I know you were asked this question about the death penalty here, number fifty-six, Originally "Do you believe in the death penalty?" Originally you circled yes and then you wrote no and you cross out your answer and you wrote "No one has the right to take another one's life." Why don't you just tell us in your own words—you've had a couple of nights to think about it and mull it over in your mind—how you feel about the death penalty and capital punishment generally speaking and then secondly, how you feel about your ability to actually serve on this type of a case and actually participate in that decision-making process where someone such as the Defendant would be executed?

A My honest opin—I don't believe in capital punishment. Like I said on there, I don't believe anyone has the right to take another person's life. If he committed a crime and if he is convicted and it's proven without a shadow of a doubt, as you say, then, yes, I believe he should be punished. He should be rehabilitated or whatever can be done, but I

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[4168] between counsel and the Court, after which the following proceedings were held.)

THE COURT: Macaluso, I'm going to hold that he is qualified.' I respectfully disagree with the State on it.

MR. MACALUSO: Judge, in light of the Court's ruling and in light of the statements made by the Court, we'll use a preemptory challenge.

THE COURT: Bring Mr. Bailey back in, please.

Mr. Bailey, you're going to be excused from service in this case. I'm sorry you had to wait out there in the hall.

Off the record, Pam.

(Whereupon, an off the record discussion was held, after which the following proceedings were held.)

THE COURT: Mr. Jones, how

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[4771] RUSSELL L. JONES,

called as a jury panel member, having peen duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Mr. Jones. As I was introduced to you on Monday, my name is Jim Nelson. The gentleman seated next to me is Mr. Paul Macaluso. There will be a third attorney involved for the State of Texas whose name is Norman Kinne. Mr. Kinne will present the evidence for the State in this case. We are all three assistant district attorneys and we've been assigned by Henry Wade to handle this case for the State of Texas.

Seated to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Jones?

Q He will probably be joined in a few iaonents by fir. Royce West. Mr. Cunningham and Mr. West have been appointed by Judge McDowell to defendant Thomas Joe Miller-E1, the

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[4173] you will feel a little more confortable and it will be a little easier for you to talk about some things in this format than it would in front of forty or fifty other people. As the Judge said, let me invite you to relax. You don't look nervous up there now. Hopefully you will relax and be comfortable with us and be as honest and as open as you can in talking about these things. Remember that there are no right or wrong answers to anything we're going to talk about.

This is Mr. West right here.

We just need to know how you feel about these things and that's where we're headed and that's what IIm going to try to talk to you about during the next few minutes.

Mr. Jones, I feel like to start things out I ought to tell you what our position is in this case, that being the State of Texas. We are actively seeking the death penalty for Thomas Joe Miller-E1. We know the law allows for it in this type of offense and we intend to present to a jury and to you if you're on that jury the faci.s and evidence to allow the jury to convict him of the offense of [4174] capital murder. Then we intend to present the type and quality of evidence to allow a jury answer three questions yes. If those three questions are answered yes, judge McDowell has no option whatsoever but to assess the death penalty in this case. He doesn't have any discretion in the matter. The decision is made by the jury. We'll talk about that in a little bit more detail as we go

through here. That's our position. What counts is your position.

You had a chance to fill out a questionnaire on Monday and you've had a couple of nights to sleep on it. I would guess to come in here expecting to be on another civil case or a shoplifting or something and finding out it's a capital murder would kind of shake me up a little -bit, I think. Now that you've had a chance to sleep on it, would you tell us please your feelings about the death penalty, whether it serves a purpose or not, and secondly, whether you feel like you could serve on this type of jury?

A Well, I'm for the death penalty as a matter of principle. I feel like it is a deterrent to crime. I guess I could serve on

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[4187] A Yes, sir.

Q Do you feel like you can set your personal feelings aside and answer those questions based on the evidence?

A Yes.

Q Any problem with that at all?

A No.

Q Okay. Mr. Jones, there's another thing that may come up in this case. We don't anticipate that it will, out it might. I told you that we called this murder plus. Let's take a different case. Let's say you're a juror on a capital murder where it's an alleged murder during the commission of a burglary. We present our evidence and you hear about the murder and we prove beyond a reasonable doubt that the man committed murder, but you don't hear a word about a burglary. There's no evidence at all about a burglary. Then we haven't proved capital murder, have we?

A No.

Q We've proved murder?

A Yes.

Q Murder in the State of Texas is the knowing or intentional killing of another [4188] human being. It does not

carry the death penalty. The range of punishment for murder in Texas is the broadest for any offense in the State of Texas, anywhere from five years up to ninety-nine years or life and a fine of up to $10,000.00. When I say the knowing or intentional killing of another human being, we're talking about somebody who did it, knew they were going to do it, intended to do it, however you want to put it. It's not a self-defense situation because if the jury finds self-defense, then a person is not guilty. It's not an accident. If the jury were to find it was an accident, again, he's not guilty. If the jury were to find that.he was insane at the time, he would be not guilty. It's not a killing in the heat of passion.

I have a four year old daughter. If I came home one night and I found out that somebody had come in and raped and abused her and the guy that did it was standing two houses down with a beer in his hand laughing about it, I might very well go down there and just blow him off the face of the earth. If I did that, the jury might decide that was a killing in the [4189] heat of passion. That's not murder in Texas. That's what we call voluntary manslaughter. It's a different crime with a different range of punishment. So we say murder is the killing of another human being without any legal justification or without any legal excuse. Again, those are self-defense, accident, the things I ran through. Would you agree with me, Mr. Jones, that there are hundreds, if not thousands, of different situations in which one person could kill another person?

A Yes.

Q I imagine that the four lawyers here could sit here with you frow now until tomorrow morning and we could keep coming up with examples of different ways murder could occur. We aren't allowed to give you examples, just like we're not allowed to give you the facts of this case. There may be provocation involved that doesn't amount to self-defense and it doesn't amount to a legal excuse or legal

justification, out it's still something you can consider. You can consider the prior relationships between the parties. You can consider if there were third persons involved. [4190] You can consider anything leading up to the murder. All the surrounding facts and circumstances come into play. In order for you to be qualified to serve on a jury like this, Mr. Jones, you have to be able to tell us that you have an open mind as to that entire range of punishment, that your mind isn't closed to one end or the other or to the whole thing, for that matter. When I say to have an open mind, the legal phrase used is able to consider, are you able to consider the entire range of punishment. You don't every have to me able to sit there right now and think of a situation where you would give a life sentence or think of a situation where you would give a fifteen year sentence or think of a situation where you would give a five year sentence. The law doesn't even want you to do that. If you were sitting there and decided, well, this is a five year case and this is what I have to hear to give five years, then you've closed your mind to some other things that might be a five year case. Obviously you can't tell us right now what you would do in a case because you haven't heard any of the evidence, so you don't know.

[4191] Again, it's back to that old phrase. We're asking you to keep an open mind until you've heard all of the evidence. what we need to know from you, Mr. Jones, is if you can consider that entire range of punishment. Let me put it this way: if you were sitting on a jury and you convicted a person of murder, he knowingly or intentionally caused the death of another human being without any legal justification, without any legal excuse, they killed them, knew they were going to kill them and they did it, after you've heard all the facts and circumstances of that case, everything about the offense itself and. everything about the defendant, other persons that might have been involved, all the surrounding facts and circumstances, if you believed after hearing all of that, that those facts and circumstances justified a ninety-nine year or life

sentence, could you give a ninetynine year or life sentence? That's been a pretty long-winded question.

A It sure was.

Q Do I need to compact it a little bit?

[3192] A Well, 1 think I could look at it openly and make a judgment yes or no.

Q 1f the facts and circumstances called for a life sentence, you could give a life sentence?

A Right.

Q Let's go to the other end. Again you've convicted somebody of murder. You've heard all the facts and circumstances. If those facts and circumstances in your mind justify and call for a five year sentence, could your give a five year sentence, could you give a five year sentence for the offence of murder?

A I guess I could make a decision, but five year for murder—

MR. WEST: I'm sorry, sir. I didn't hear the last part.

A I said the five years for murder would be kind or light.

Q Okay. As I said, it's a very wide range of punishment for the offence of murder. I guess there is a myriad of circumstances under which murder can occur. What we're asking you, Mr. Jones—as I think I said, you don't even have to be able to think of a situation that call for five years You may say, I can't imagine hearing a set of circumstances that would justify a five year sentence for the offence of murder. What we're asking you is—you may be sitting here , twenty from now on another case, a murder case, and you've heard all the fact and circumstances and y say, wow, I never thought I'd hear it, but here it is. Here is that one in a million case that the facts and circumstances justify a five years sentence. If you get in that situation and those facts and circumstances say to fir. Jones that it calls for a five year sentence, can you give a five year sentence?

A Yeah, if the facts say it and that's what the law says.

Q That's the law and that's what the judge will instruct you is the law. You're asked to base your verdict on the evidence, on the facts and circumstances. if that evidence calls for twenty-three years in your mind, then you could give twenty-three years. If it calls for life, you could give life. If it calls for five years and you thought five years was proper: in your mind, you will give five years; [4194] is that right?

A I guess I could, but—

Q Okay.

MR. WEST: Your Honor, could this gentleman be allowed to finish his answer?

THE COURT: Did you have something you wanted to add to that, Mr. Jones?

A I thought that I would listen to the evidence and it was either guilty or not guilty, you know, answer the three yes. So why are you bringing up the five years?

Q Okay. As I talked about earlier, we have murder plus in this case.

A Right.

Q There is also the possibility—we don't anticipate it, but there is the possibility that you would not find that this murder was committed in the course of a robbery, so you would find in that case that he was guilty of murder, not of capital murder. The only time those questions come into play is on capital murder. If you as a jury feel that we have not proved capital murder, all we have [4195] proved is murder. If you find him guilty of murder, then it will be your duty to assess they punishment for that case of murder. It's what we call a lesser included offense of capital murder. that's why I'm having to go into all this stuff because it's kind of like buying flight insurance, I guess. You don't expect Delta Flight No. 121 to go down in the field north of DFW, but people buy flight insurance on the slim chance that it might. Since there is a possibility that you might be put in that situation, then we have to be sure that you're qualified

under the law to assess the punishment in that situation for the offense of murder in order for you to oe qualified, you have to be able to consider that entire range of punishment for the offense of murder, not capital murder. Does that make it more clear?

A Right.

Q All we're asking of you, Mr. Jones—and I'm sorry I didn't make that clear earlier. It may be an extremely rare case and probably should be an extremely rare case where you would give either extreme of punishment, see that extremely rare case, that [4196] the facts' and circumstances justify a sentence of five years, could you give [4196] a sentence or five years?

A Yes, I could, yeah.

Q That's the law. That's what the law says in Texas. You may personally feel that, if you were governor or you had the power to set the range of punishment, you might say it ought to be fifty years and up for murder or something like that. just like I might say, when I get out in west Texas, that I ought to be able to drive eighty-five instead of fifty-five when you can see a hundred miles in every direction. But the speed limit is fifty-five, so that's what I drive. If the law is—they may not believe that's true. If the law is that the range of punishment is Prow five years up to life for the offense of murder, you could abide by that law; is that right?

A Yes.

Q If you hear a five year case, you could give a five year sentence?

A Yes.

Q There is one other thing that you've probably heard something about and that

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[4240] FILEMON P. ZABLAN,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Let me begin by reintroducing everybody here. You may remember anyway, but I'm Paul Macaluso. This is Jim Nelson.

MR. NELSON: Good afternoon.

Q The man to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: Good afternoon, Mr. Zablan.

Q The vacant chair next to him will be occupied by Mr. Royce West. They're the defense attorneys who have been appointed by the Court to represent the Defendant. He's in the far right chair over there. Can you see him there? His name is Thomas Joe Miller-El and he is charged with capital murder.

Jim and I are assistant criminal district attorneys here in Dallas. We represent the State. Do you know any one of us or have [4241] you ever heard of any one of us?

A No, sir.

Q Mr. Zablan, as you know, you are a prospective juror on this case. We have nine jurors so far. We've considered over a hundred people so far and we only have nine. You can see it's a very drawn-out and tedious process. This is the middle of the fifth week that we've been doing this.

We want to talk to you and basically we want to find out how you think and how you feel about certain things and I want to emphasize right from the start that no one is going to argue with you or quarrel with you about your feelings about

anything. No one is going to try to talk you into anything or out of anything. We just want to know how Mr. Zablan feels because this is a very, very serious case as I'm sure you know. It involves the very highest level of offense. Mr. Miller-El is charged with capital murder. If a person is convicted of capital murder in Texas, he can receive only one of two possible penalties. One is a sentence of death by lethal injection and the other is a sentence of life. You can [4242] see how high the stakes are and how serious this is and why we need to talk to you seriously to see how you feel about certain things.

I'm going to say this again because I do repeat myself. I want you to understand that no one is going to try and change your mind or argue with you about anything. What is absolutely the most important, Mr. Zabian, is you simply tell us honestly how you feel about anything that might affect your service on this case. Will you do that?

A Yes.

Q If you have a question about anything, ask it. If there is something that you need to tell us, tell us. Don't be bashful. The other thing is, I want you to relax.

Ordinarily we would be talking to you out in front of a bunch of other people. We want you to relax as much as you can and feel as comfortable as you can and just speak your mind.

Let me tell you what our [4243] position is, that is the position of the State of Texas. we are actively seeking the death penalty in this case for that Defendant right down there. In other words, we know that the law allows in certain cases for the death penalty and we intend to provide the type of evidence to a jury, once it is selected, that would convince them beyond any reasonable doubt that the Defendant is guilty of capital murder exactly as he is charged. Now, that's done in the first part of the trial.

In the second part of the trial where the penalty is returned, either death or life, we intend again to offer the jury the type of evidence that would convince them beyond a reasonable doubt that those questions should be answered yes. You know the result, all yes answers, yes, yes, yes, equals death. There is no question about it. If the jury answers each question yes based on the evidence, then the law absolutely requires Judge McDowell to sentence that man right there—take him down to Huntsville, Texas and eventually have a needle put in his arm and they would kill him.

[4244] The reason why I mention that is not to make it sound real dramatic or tragic or anything, but it's just that a lot of people 1 suppose come down here on jury duty thinking they re going to be on a burglary case or a theft case or something like that or a DWI. All of a sudden they get into this courtroom and they find out they're involved in a death penalty case. It's no longer a situation where we all sit around at various times and talk about how we feel about this and how we feel, I about that, over coffee or a beer or something. How do you feel about the death penalty? It's one thing to talk about it, isn't it, and it's another thing to find yourself in a position where you may be called upon to actually make the decision that would result in this man actually being executed. You know that they, a execute people.

It's not like it was ten years ago where they gave people death sentences, but no one was ever executed. They were all commuted o life or whatever happened. I'm just trying to draw things into focus for everybody, just in fairness to everybody, so they really [4245] appreciate just how serious this is and then of course how incredibly important any decision you make is and what effect it would have if you serve on this jury.

Now, I've done enough talking. I know you filled out a questionnaire on Monday and you had very little time to accomplish that. Now that you've had a couple of days to

sleep on it, would you share with us your personal feelings about the death penalty generally speaking and then your ability to actually serve on a jury of this type and make a decision based on the evidence and the law? How do you feel about the death penalty?

A The way I feel is, is that the punishment should fit the crime, no more, no less.

Q Do you feel that the death penalty serves a particular purpose in our society as a function?

A Yes, sir.

Q How do you perceive that?

A I guess, if somebody is really guilty of like shooting a person, beyond a reasonable doubt he is guilty, then he is going [4246] to be a menace to society and he should be put away.

Q Have you felt that way for a number of years?

A I have not given it a lot of thought, but when I do, I have to be really convinced because it is taking a man's life away.

Q The law absolutely requires you to be convinced beyond 'a reasonable doubt.

A Yes.

Q Your response to question number fifty-six in the questionnaire was "If it's the law and if the crime fits such punishment."

A Yes, sir.

Q I gather from what you said there—you didn't have a whole lot of time to think about that—that you're the type of person who believes very strongly in following the law. Some of us have some misgivings about some of the aspects of the law, but the courtroom is not the place to change the law.

A The reason I said that is, if it is the law, I believe in it. Some states don't have a death penalty. If I live in that state [4247] and abide by it, unless somebody comes over and changes the law, then that is the law for me.

Q If it is the law, whether you agree or disagree with it, you're going to follow it?

A Yes.

Q And your answer here, if the facts of the crime, what you learn once the trial begins, calls for a guilty verdict, then you will go by the facts and the law?

A Yes.

Q You can put aside your personal feelings one way or the other and follow the law and be guided by the facts?

A Yes.

Q Even though you may be guided by this aspect of the law?

A It depends on the case. If in my conscience there is really no question about it, then I would have no reservation in applying the law. I might follow the law with some reservation, but it is the law and I have to have it clear in my conscience.

Q Let's talk a little bit about capital murder. A person can only receive the [4248] death penalty in Texas as an option in very special circumstances, very limited number of circumstances. Number one, it must involve, but just not any kind of murder. It must be a very, very special type of murder that the law has designated and called capital murder.

Now, murder is actually an offense in Texas. That is what we call a first degree felony. It is not an offense that you can receive the death penalty for. Murder carries a punishment of from five years to ninety-nine years or life and you can even receive an optional $10,000.00 fine. Murder becomes capital murder when it is the killing of a particular class of individuals, you murder a police officer or a fireman, prison guard, you kill someone to collect insurance or mass murder. Situations under those circumstances are elevated to capital murder where you can receive the death sentence or a life sentence, one person killing another person during a burglary, robbery or while raping them. Murdering somebody during an arson or a kidnapping, the law says that is a special type of

murder and is even more serious and you can [4249] receive the death sentence or a life sentence only because it is a capital murder. Do you have any problem with that?

A No.

Q Murder plus a felony, that is called murder plus. We have alleged in this indictment that the Defendant murdered a man named Douglas Walker while in course of committing or attempting to commit robbery. Do you see what I'm getting at, murder plus? Does that type of offense, murder during a robbery, strike you personally as the type of offense that you feel the death penalty would be warranted depending on the facts of the case?

A Yes.

Q And assuming we prove the Defendant is guilty beyond a reasonable doubt, you could find the Defendant guilty of capital murder?

A Yes.

Q Let's talk a little bit about some things that come into play in any type of a criminal case and certainly in a capital murder case. This may sound like a civics lesson on some things that are fundamental whether it is [4250] a shoplifting case or a capital murder case. I know you're familiar with all of these things, but we want to go over them in a case like this just because they're so incredibly important in fairness to both sides, okay?

A Okay.

Q First off, you start off with the presumption of innocence. You understand that?

A Yes, sir.

Q That's something that is fundamental to our system of justice, as you well know. That is, at the start of a criminal trial, anybody charged with a crime is presumed to be innocent. All right?

[4251] A Yes, sir.

Q In other words, as you look at the Defendant over there, you must tell us in all honesty that you presume that he

is innocent. That's where we start off. That's the starting point in any criminal trial. You must look towards the State to overcome or rebut the presumption with the evidence to convince you beyond a reasonable doubt that he is guilty, otherwise you continue to believe that he is not guilty. Can you do that?

A Yes, sir.

Q In other words, the fact that he has been arrested , and we can reasonably assume he has been arrested and indicated and that he is here in the courtroom today, some people might say, well, you know, where there's smoke, there's fire. He must but a little bit guilty. Well, you know that's not how the law works. No one is just a little bit guilty or he's innocent. Do you see what I'm getting at?

A Yes, sir.

Q As he sits there, you have no problem at all presuming that he is innocent; is that correct?

A That's right, sir.

Q All right. I can't think of anything that is any more fundamental to our system or any more important that that. Now, you understand that the indictment is on evidence of guilty. You understand that?

A Yes, sir.

Q We can go to the Grand Jury can get an indictment and accuse somebody of an offense, but that doesn't mean we can prove it, [4252] does it?

A That's right, sir.

Q You know that people are charged by indictment all the time and juries find them not guilty. Cases are dismissed sometimes. So the indictment is no evidence at all. All it is, is legal document that tells him what he is charged with and that's all it is. It doesn't matter how bad it sounds, but it's not any evidence at all and you would not consider it as any evidence, would you?

A No, sir.

Q Okay. The next thing is, you know that the burden of proof is an criminal case is always the State?

A Yes, sir.

Q We have brought forth this indictment and we have accused him of capital murder and the law says we can do that, but you know the old saying, he who does the accusing does all the proving. It's kind of like, put up or shut type of deal. That's what it boils down to. When I was a kid growing up, that's how it went. We pointed the finger at him and the law says, fine, but we must come [4253] forward with all of the evidence to convince you, as you said you would require, to convince you beyond any reasonable doubt whatsoever that he is guilty and then, if we do, the law is clear. You should find him guilty, do you see, if we convince you beyond a reasonable doubt.

On the other hand, if we don't convince you beyond a reasonable doubt, if we don't live up to our burden of proof, you should find him not guilty. Will you do that?

A Yes, sir.

Q All right. It's really pretty cut and dried, isn't it?

A Yes.

Q If we prove what's in here beyond a reasonable doubt and you don't have any reasonable doubt, you find him guilty. If we don't cut him loose. Fair enough?

A That's right.

Q Now, understand that we have the burden of proof at all times, in both phases of the trial, in both arts of the trial. The Defendant and his lawyers have absolutely no burden of proof whatsoever, none. The only requirement that the law sets out for a [4254] defendant in a case at any time is that he be here for the trial. I'm reasonably sure that he will be here for the trial, out beyond that he can sit there and not say a word and not call a witness and not do a single thing because he has absolutely no burden to do anything under the law at all. Do you have any problem with that at all?

A No, sir.

Q That seems fair enough under our system,' doesn't it?

A Yes, sir.

Q Okay. The same thing, he has no burden to disprove anything. ' In other words, you can sit over there as a juror and listen to the State and see what kind of evidence we bring forward and, if we convince you beyond a reasonable doubt that he did this, if we do fine, you convict him. But if we don't, you cut him loose. Whether he calls any witnesses or whether he testifies or not, it doesn't matter. Can you do that?

A Yes, sir.

Q In other words, when you look towards the proof in support of this [4255] indictment, where are you going to look?

A To the State.

Q To the State, at the prosecutor?

A Yes, sir.

Q That's us. Okay. Now, you understand that any person charged with a crime, and that would hold true for me, for you, or anybody, my daughter charged with a crime, they have the right to remain silent. You know in the Soviet Union, as you well know, you're guilty until you prove yourself innocent, right?

A Yes.

Q That's not how it is here obviously. Even though anyone who is charged with a crime can testify and they can call witnesses if they want to, you know that they have no burden to do that. If a defendant chooses not to testify, then you cannot consider that as any evidence whatsoever of the defendant's guilt. Do you understand that?

A Yes, sir.

Q In other words, even though you nay be curious wily a defendant didn't get up and testify, if he doesn't, the law that the judge would actually instruct you—he would actually give you written instructions that you cannot talk about it, think about it, or even consider it as any evidence whatsoever

of the defendant's guilt. Would you have any problem in that regard at all?

A No.

Q Can you tell the Defendant and tell us that you would not consider a failure of his to testify as any evidence at all? Can you tell him that?

A Yes, sir.

Q Now, let's talk about criminal trials generally speaking and how they're conducted. Have you served on a jury before?

A No, this is the first time.

Q A criminal trial is divided into two parts. The first part concerns itself only with the guilt or the innocence of the person who is on trial. In other words, you listen to the evidence and at the end of the first part of the trial, if you're convinced the Defendant is guilty, find him guilty. If we haven't convinced you, whether the defendant has testified or not, cut him loose. Fair enough?

[4257] If you find him not guilty, that's the end of the trial. If on the other hand you find him guilty, then we go on into the second phase where you get these questions and that's where the determination is made as to either death or life.

Now, you understand that just because you convict somebody of capital murder doesn't mean that they automatically get the death penalty. You understand that?

A Yes.

Q In fact, you understand that they either get a death sentence or a life sentence depending upon the answers to those questions. You understand that we're seeking the death penalty and we're the ones that want the death penalty just like we want you to convict him, based on the evidence. The law says, fine. Just like the law says we must prove and convince you beyond a reasonable doubt that he has committed the offense, the same thing would hold true in the second part of the trial. We have the burden of proof to convince you that the questions should be answered yes. You

know the effect of three yes answers equals death [4258] automatically. The law would automatically require the Judge to assess a sentence of death.

One or more no answers equals an automatic life sentence. Do you see what I'm getting at?

A Yes, sir.

Q If we expect you to answer those questions yes and if we want you to answer those questions yes, then we must convince you beyond any reasonable do not by the evidence that the questions should be answered yes.

A That's right.

Q Then he gets the death sentence. If not, if we don't convince you beyond a reasonable doubt and if you think one of those questions should be answered no, then so be it and he gets his life sentence. Fair enough?

A Yes, sir.

Q Will you make the State prove that each of those questions should be yes before you answer them yes? Would you require that kind of proof beyond a reasonable doubt?

A Oh, definitely.

Q Okay. Now, in the old days, until [4259] about thirteen years ago, in a capital murder trial, after the jury heard all the evidence, they actually decided life or death directly just like they do in the movies. If all or the jury believed he should get death, he got death. If they all agreed it should be life, then that's what it was.

Let me ask you, do you think you could have made a decision like that based on the evidence after you heard the evidence in a capital murder case? If you felt it was proper to give death, you would have given death and if you felt it was proper to give life, you would give life?

A The majority rule and, if all the evidence was presented and I don't have any reservations in my mind, no doubts, then I would say yes.

Q You understand that the jury has to act unanimously? In other words, you vote your own conscience individually. You decide for yourself what you think is proper, but for any verdict to result, say the death sentence, must be unanimous, all the jurors must agree.

A That's right.

[4260] Q Now, the law changed about twelve years ago and no longer do the jurors decide directly, personally, subjectively, whether or not someone should die or get a life sentence like they used to do in the old days. Instead all you're called upon to do is to listen to all of the evidence in both parts of the trial, you see, and then the Judge would give you those three questions to answer. He may only give you the first two, but whether he gives you two or three, you're called upon to answer the questions. If the proof is there that convinces you that the questions should be answered yes, you answer them yes. If not, you answer them no.

You know that the effect of all yes answers is death and one or more no answers is life. Can you do that?

A Yes, sir.

Q Let's look at the questions. I think you probably had a chance to read the first two questions while you were sitting out with the panel here the other day. Do you have any questions about them at all?

A I have no questions.

[4261] Q How about number three?

Q I have no questions.

Q Okay. Let's look at them very briefly, okay? The first question, I think, is pretty self-explanatory, isn't it?

A Yes.

Q It asks you to decide whether the defendant acted deliberately and with the reasonable expectation that someone was going to die. Can you see when you learn about the facts of the offense and how everything happened you could make that decision, did the defendant act deliberately and with the

reasonable expectation that someone was going to die? Do you see how you could answer that question yes or no depending upon the evidence?

A Right.

Q Let's go on to number two. That's a question that looks towards future behavior, would you agree with me?

A (No response.)

Q Well, let me just ask you this: What do you think you're being asked in that particular question?

A In other words, would he commit [4262] another murder over there.

Q Sir?

A I said would he commit another murder, in number two, if he's set free.

Q Okay. Would you agree that a key word in, that question is that word probability?

A That's right. That's what I'm looking at, probability.

Q What does probability mean to you in the context of that question? What do you think that means?

A It may happen and it may not happen.

Q More likely not, fifty-fifty?

A That's right, fifty-fifty.

Q I noticed that you said murder, that he would commit another murder. You notice that they didn't say another murder, did they? They said criminal acts of violence. Would you agree with me that murder, of course, is a criminal act of violence?

A Yes.

Q What comes to your mind when you think of criminal acts of violence?

A Continue to be a menace to society.

Q Like committing some criminal acts of violence. It may be a murder. It may be a robbery.

A That's right.

Q It may be some sort of physical assault of some type.

A That's right.

Q Mr. Zablan, what do you think would be most helpful to you in answering those questions yes? What would you want to know about the background or about an individual that you feel would be most beneficial in answering that question?

A Well, I have to know like the background of the individual, his environment, where he grew up, who his friends are and usually background, environment and home, I guess.

Q Okay. Let me ask you, would you agree that almost every human event is divided into three phases; what happens immediately before the event, what happens during, and what happens after?

A Yes, sir.

[4264] Q Even a capital murder. In other words, you would be able to learn when you learn about the offense if there was any planning involved in the murder, what roie a defendant had, if any at all. In other words, was he directly involved or indirectly involved? Then during the offense, was he a leader or was he a follower, did he have to do the killing, did the killing have to happen or was there some other course of action that could have been taken instead of killing somebody? Do you see what I'm getting at?

A Yes.

Q Afterwards, was he sorry and remorseful, was he contrite or was it blase and nonchalant, you know, another day at the office? Do you feel you could learn enough about an individual when you learn all the dynamics, the full spectrum of criminal behavior, of one criminal episode where you could say, yeah, there's a chance that this guy is going to commit—he would be a menace to society from now on? Do you think you could answer the question yes when you learned all about the crime itself?

[4265] A Yes, sir.

Q Now, number three that ask you basicall-that boils down to this, I think: Was this a provoked killing or was it an unprovoked killing? Would you agree with me?

A Yes, I agree with you.

Q If you unprovoked killing, then you question yes?

A Yes.

Q If you decide that there was some provocation—

A Then I have to answer it no.

Q Right. You could answer that yes or no as well; is that correct?

A Definitely.

Q You understand that these questions here are provided, I think, jury to kind of insulate a jury from emotional decision. In other words, and old way the jurors decided emotionally or subjectively whether someone should die or live. Now, we know you could be sitting over there, any juror could be sitting over there, and listen to a capital murder case and decide, [4266] well, yeah, it makes your blood boil. You could hear facts that are so bad. Yet, on the other hand—you know, that would cause you to convict somebody. But yet on the other hand, when it comes to answering these three questions, the State may not have given you enough answers to satisfy you that the questions should be answered yes. Do you see what I'm getting at?

A Uh-huh.

Q You understand that your oath as a juror would require you to answer the question , no which would result in a life sentence. Do you see what I'm getting at?

A Yes.

Q Something contrary to your personal feelings. The same thing would hold true, if you decided that someone ought not to die, but you would say that you would vote for a life sentence. You can't vote for a life sentence, can you? All you can do is answer the questions. If the proof measures up to three yes answers which would result in a death sentence, you have to' go ahead and answer them. In other words, you

put aside your personal [4267] feelings and simply answer the questions and let the law take its course. Can you do that?

A Yes, sir, I could.

Q Okay. Let's shift gears here for a second and let's talk about something that I'm not suggesting would occur in this case, but we'll just discuss it because there is always the possibility. Let's imagine for a moment that you're on a jury, a capital murder jury. Let's say that the indictment alleges a murder plus a burglary. That's capital murder. Let's say you hear all the evidence that convinces you beyond a reasonable doubt that murder occurred, but you don't hear any evidence about the burglary or you have a reasonable doubt, so you're not convinced that the murder occurred during a burglary. Am I making myself clear?

A Yes.

Q Bearing in mind that we must prove both the murder and the burglary if we expect you to find that defendant guilty of capital murder, you see we haven't lived up to our burden, have we?

A No.

[4268] Q All we have proved is murder. We didn't prove capital murder, did we?

A No, you didn't.

Q Now, if that were to happen let's say you found someone not guilty of capital murder, but instead guilty of what we did prove, which was murder, then you have to forget all about life or death, you see, because that's not even in the range of punishment. Am I making myself clear?

A Yes.

Q The range of punishment for murder, and murder is a separate offense altogether, under the laws of Texas is as Broad as it is for any offense. There is no broader range of punishment whatsoever. The legislature has set out, we feel, that broad range, from five years to ninety-nine years or life and a $10,000.00 fine, so that the jury can basically tailor the

punishment to fit the crime once the jury has heard all of the facts. Fair enough?

A Yes.

Q That's what it boils down to. know that's a cliche, make the punishment fit [4269] the crime, but it's true. That's what the law says. Number one, the law expects you simply to tell us, to be a qualified juror, that you will follow the law, consider that full range of penalty and that you have not closed your mind to any part of that range of penalty, to have an open mind and you will tell us that you have—of course, you haven't heard any evidence yet—

A No, I haven't.

Q —and you're an open-minded person and you will wait and you will listen to all of the evidence and then and only then, once you've heard all of the evidence in the murder case, you will decide what the penalty ought to be. If you hear facts and circumstances that call for and warrant and justify—in other words, you just feel it's the right thing to do to give the maximum, you will give the maximum. If on the other hand, you're a juror on a murder case and you have an open mind and you sit over there and you listen until all the facts are in and you hear a fact situation that to your way of thinking calls for and warrants and justifies and again it's [4270] the right thing to do based on the evidence which you've heard to give the minimum, you will give the minimum. Can you do that?

A Yes, sir.

Q You know as well as I do—we've both lived long enough to know to know this: A murder is a murder. Sure, it's bad because someone dies, someone has been killed. Will you agree with me that there are all different types of facts and circumstances that surround murders?

A Yes.

Q And the law allows you to decide whether a case should get the maximum for murder or the minimum or somewhere in between—the law allows you to consider all

the important things like what? Like the background of the victim. What kind of a person was the victim? What kind of person was the defendant? What happened? What precipitated this murder? What were the circumstances? What brought this thing on and why?

A That's right.

Q Do you see what I mean?

A Yes.

Q Now, murder is actually a situation where one person knowingly or intentionally causes the death of another. Those are legal terms, knowingly or intentionally. The Judge will actually define them.

A Because in my mind I have to be sure—or I have to be sure that the man is innocent all through the trial. He's got to be innocent until the very last word has been said. Whether he's guilty or not—

Q That precisely correct.

A That's going to be in my mind. I'm not going to prejudge or anything else. I'm just going to sit there and listen and find out what the heck is going on and why is this guy over here or if he's supposed to be out there in the streets working somewhere, why is he in here.

Q In other words, you will guided by the evidence?

A That's right, sir.

Q And you will be guided by the law; is that correct?

[4272] A Definitely.

Q In other words, you said you're not going to prejudge anything. You will have an open mind. What I'm getting at about murder is, the law allows you to take into consideration all of the facts and circumstances surrounding a murder and then you decide what the proper thing to do is once you have all that evidence presented to you. I want you to near in mind a couple of important things. Murder is a situation under the law legally speaking where one person knowingly or intentionally causes the death of another. That's without any legal excuse or any legal justification. In other words, it's not

self-defense and it's not accident. If you found that somebody killed someone and it was an accident or in self-defense, you would have to find them guilty. Do you understand that?

A That's right.

Q If for example you thought someone was insane, that's a homicide, but it's not murder. For example, if you had a situation where somebody killed someone and it was a [4273] crime of passion—for example, if somebody came home and found out that their daughter had been raped by the neighbor and the neighbor is up the street laughing about it, drinking a beer and bragging about it, and that father got a gun and went up there and killed the neighbor, you see, that's a homicide and it's a crime, but it's not murder. That's what we call a crime of passion. We're not talking about that. We're talking about where one person, for whatever reason he may have that you might learn about during the trial, killed somebody and it's murder. Are you telling us that you will wait in a situation like that and, if you see a case that calls for the minimum, five years, you will give five years? If you feel that's the right thing to do, can you give—

A Yes.

Q If you hear a fact situation and you feel after you've heard all of the facts that it calls for ninety-nine years or life and you think that's the right thing to do, will you give ninety-nine years or life?

A Yes, sir.

[4274] Q And anywhere in between that you feel is proper; is that correct?

A Yes.

Q In other words, you haven't closed your mind to a rive year sentence or a ninety-nine year sentence?

A No, sir.

Q One other matter here and let me just address this briefly. The Judge would also instruct you as to the law of parole. Now, you've heard of parole, haven't you?

A Yes, sir.

Q What this means basically as the Judge will instruct you, anyone who is charged with a crime and convicted of a crime, whether it be murder, burglary or whatever it may be, and is sentenced to the department of corrections may become eligible for parole and good-[4275] time. In other words, that's good conduct in the penitentiary. The judge would instruct you as to the law in that regard. Then the judge would go on and tell you that, since it accurately determined how that will actually come into play, in other words, how soon someone would be paroled or how much good-time they would get, do you see, that you as a juror could not consider that in deciding how much penalty a person should get. Am I making myself clear?

A Yes, sir.

Q In other words, they kind of tell you about it and then they say to forget it. That's what the law expects of you. The judge will actually instruct you that you cannot consider it in deciding whether someone gets five years, fifteen years or how much time they're going to serve before they get paroled. You just put that all out of your mind. If you think someone deserves five years, you give them five years. If you think someone deserves ten years, you give them ten or ninety-nine years or life. Can you do that?

A Yes.

Q One last matter. You understand that you as a juror will decide the believability or the credibility of the witnesses who testify?

A Yes, sir.

Q And the law is very clear about this, that you do not prejudge any particular [4376] witness because of the nature of their profession or occupation or their station in life. In other words, you take the witnesses as they come. You don't give anyone a head start, so to speak. You just sit there and tell us that you would judge everybody by the same yardstick and you will wait and keep an open mind and listen to what they have to say and then after they say what they have to

say, you will decide how much or how little of their testimony to believe.

A That's right.

Q Can you do that?

A Yes, sir.

Q One last matter, I promise. The Judge talked to you about basing a conviction on the testimony of one eyewitness if you believed the eyewitness beyond a reasonable doubt. Can you do that?

A Yes, sir.

Q Mr. Zablan, I'm out of time and the Judge has been very patient with me. Do you have any questions at all of me at this time?

A No, sir.

[4277] Q Can you be fair to both sides:

A Yes, sir.

Q I think you can, too, Mr. Zablan. Thank you very much.

MR. MACALUSO: I'll pass the juror.

* * * *

at the number of years that you are to assess. Could you and would you do that, sir?

Yes, sir.

Q Do you know of any reason why you could not be a fair and impartial juror if chosen, sir?

A Nothing at this time.

MR. CUNNINGHAM: Pass the juror, Your Honor.

MR. MACALUSO: Your Honor, the State would be pleased to accept Mr. Zablan as a juror on this case.

MR. CUNNINGHAM: The defense would be pleased to accept Mr. Zablan as the tenth juror in this case.

THE COURT: Thank you. Mr. Zablan, let me ask you first of all to raise your right hand.

(Whereupon, the juror was duly sworn by the Court.)

THE COURT: You have just been sworn as a juror in this case. As one of the lawyers, I

* * * * ANNA L. KEATON,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. Keaton. You may remember from Monday that my name is Jim Nelson. I want to reintroduce everybody here because it's been a couple of days. The gentleman seated next to me is Mr. Paul Macaluso. There will De one other attorney involved for the State of Texas when we start the testimony in this case and his naive is Norman Kinne. The three of us are assistant district attorneys here in Dallas and we've been assigned by Henry Wade to handle this case for the State of Texas.

The man to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good morning, Ms. Keaton.

Q Next to him is Mr. Royce West.

MR. WEST: Ms. Keaton, good

* * * * [4330

uncomfortable, but the law requires me to do it. It may seem like I'm going back over things eight or ten different ways from time to time, but again the law requires me to do that kind of thing, so I hope you will be patient with me and near with me as we go through this. I'm really not such a bad guy. I'm not trying to make anybody uncomfortable.

[4305] Now, I guess I ought to start out, Ms. Keaton, by telling you basically what our position is in this case, that being the State of Texas. We are actively seeking the death penalty for Thomas Joe Miller-E1. We know the law allows it. We feel like we will be able to present the type and qualify of evidence to a jury to convict him of the offense of capital murder. We also feel, Ms. Keaton, once he is convicted of the offense of capital murder, we will be able to present the type and qualify of evidence to allow the jury to answer three questions yes. If those three questions are answered yes, judge McDowell has absolutely no choice in the matter but to assess the death penalty for that man sitting right there in that light blue suit.

Now, I know when I talk about things like capital punishment or the IRS laws or whatever it is, it's pretty easy to talk about when you're not really involved. We're down here talking about Thomas Joe Miller-El's life, whether he's going to live or die. The people that sit on this jury are going to make that decision, Ms. Keaton. I guess it's kind of like a job. I want you to be as clear as you can be in what you would be dealing with if you served on this jury and what's corning because, once you have a seat over there, it's too late for you to change your mind. We have to find out now whether you're the kind of person that can serve on this kind of jury. Like I say, we've been working on this for five weeks and we have ten people. You can that everybody is not suited to serve on this kind of jury. It's kind or like me walking over to one of these buildings they're building down here and somebody asks me to be a steel worker and walking a beam seventy floors up.

I guess I'm physically qualified to do it. I've got two arms and two legs and reasonable sense of balance, out there's no way [4306] in the world you would get me up on the seventieth floor walking a beam that is that wide (indicating). I just wouldn't do it. Although I'm qualified, I'm not suited to

do that kind of thing. We've had people come down here the same way and serve on this kind of a jury.

Ms. Keaton, I guess what it comes down to is, we want you to know, if the evidence comes out the way we expect it will, the way we anticipate that it will, we're going to ask the jury to answer those three questions yes. If they are, that means that Thomas Joe Miller-E1, sitting right there, at some point will be sentenced to die. He will be taken to Huntsville, Texas and placed on death row where he will stay until a few days before the time appointed by law at which time he will be moved to a group of cells near what they call the death house. At the time appointed by law, he will be taken from his cell. He will be put on a gurney—or I was told last night, it's called a litter, one of those rolling beds that they put you on to go to surgery or something—and he will be strapped down. 4307] That man right down there will be taken into the death house. He will have an IV put into his arm and they will start what they call a saline solution in that IV. As he lays there, at the appointed time, a doctor will put a lethal substance into that IV and that substance will be injected into his veins until he dies, until the life is gone from that man sitting right down there, Thomas Joe Miller-E1.

I'm not trying to draw horrible pictures or anything, but at some point we anticipate that is going to happen. The jurors that render that verdict are going to have a part in that. Now, I feel like it is only fair that you know that's our position and that's what we anticipate.

Now, on Monday you had a chance to fill out a questionnaire. It's very lengthy and we've gone over those. The one question I want to focus on at least right now is question number fifty-six, "How do you feel about the death penalty?" You answered it. You said, "It's not for me to [4308] punish anyone.", I believe are the words you used on it. You've had a couple of three days to sleep on it now and to think about it. I would just like you to tell us, if you would, in

your own words what your feelings are about the death penalty and whether it serves a purpose in our society?

A Well, I still think it's not for me to decide.

Q Okay. Let me go a little bit farther. As I said, we still need two more people to serve on this jury. People who are going to serve on this jury are going to have to decide after hearing the evidence.

A Yes.

Q First of all whether he's guilty or not guilty and second whether he's going to receive the death penalty or not. We don't want, Ms. Keaton, twelve blood-thirsty people jumping up and down to give this guy the death penalty. That's not the way it's going to work. That's not what we're going to have. What we do need, moth sides need, is twelve people who f eel that they can make the decisions that need to be made. If the evidence shows that he's guilty, they will find him guilty. If the evidence shows that he is not guilty, they will find him not guilty. If

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I'll give you a chance to argue with we as I have been.

MR. NELSON: We'll excuse, Ms. Keaton.

MR. WEST: For record purposes we would indicate that she is a black female.

MR. NELSON: We would also like the record to reflect, Your Honor, our reasons for using a preemptory strike is her equivocations on the ability to give the death penalty, her comments to me that the fact that this man would die would affect her ability to answer those questions and would affect her in listening to the evidence and further that she has a son who has been involved in the penal system and she sympathizes with Thomas Joe Miller-El's mother and knows how she would feel. We feel because of that, she could not be fair.

* * * * [4377]

FERNANDO GUTIERREZ,

called as a jury panel member, having been duly sworn by the Court to testily to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MAOALUSO:

Q Good morning. Let we begin by reintroducing everybody here. You may remember anyway, but I'm Paul Macaluso. This is Jim Nelson.

MR. NELSON: Good morning.

Q The roan to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: Good morning.

Q The vacant chair next to him will be occupied by Mr. Royce West. They're the defense attorneys who have been appointed by the judge to represent the Defendant. He's in the far right chair over there. Can you see him there?

A Yes.

Q His name is Thomas Joe Miller-El. He's charged with capital murder. Jim and I [4378] are assistant criminal district attorneys here in Dallas and we represent the State. Do you know any one of us or have you heard of any one of us?

A No, sir.

Q Mr. Gutierrez, as you know you are a prospective juror in this case. We have ten jurors so far. We've considered over a hundred people so far and we only have ten. You can see that it is a very drawn-out process. This is the middle of the fifth week that we've been doing this. We want to talk to you and basically we want to find out how you feel and how you think about certain things and I want to emphasize, Mr. Gutierrez, right from the start that no one is

going to argue with you or quarrel with you about your feelings. No one is going to try and talk you into anything or out of anything. We just want to know flow you feel because this is a very serious case, as I'm sure you know. It involves the very highest level of offense. Mr. Miller-El is charged with capital murder. If a person is convicted of capital murder in Texas he can receive only one of two possible penalties.[4379] One is a sentence or death by lethal injection and the other is a sentence of life. You can see how high the stakes are and how serious this is and why we need to talk to you seriously to see flow you feel about certain things.

I do repeat myself, but I'm going to say this again. I want you to understand that no one is going to try and change your in mind or argue with you about anything. what is most important, Mr. Gutierrez, is that you simply tell us honestly how you feel about anything that might affect your service on this jury. Can you do that?

A Yes.

Q If you have a question, sir, about anything, ask it. If there is something that you need to tell us, tell us. The other thing is, I want you to relax. Ordinarily when we talk to you, you would be out in front of forty or fifty other people. We want you to relax as much as you can and just feel as comfortable as you can and just speak your mind. Okay?

A Yes, sir.

Q Let me tell you what our position [4380] is, Mr. Gutierrez, that is the position of the State of Texas. We are actively seeking the death penalty in this case for that Defendant right down there. In other words, we know that the law allows in certain cases or the death penalty and we intend to provide the type of evidence to this jury, once it is selected, that would convince the beyond any reasonable doubt that the Defendant is guilty of capital murder exactly as he is charged. That's done in the first part of the trial.

In the second part: of the trial where the penalty is determined, either death or life, we intend to again offer the jury the type of evidence that would convince them, beyond any reasonable doubt that those questions that we just talked about should be answered yes. You know the result of all yes answers yes, yes, yes, equals death. There is no question about it. If the jury answers each question they get yes based on evidence, then the law absolutely requires Judge McDowell to sentence that man absolutey requires Judge McDowell to sentence that man right there—take him down to Huntville, Texas and evidentially have a needle put in his are and they would kill him.

[4381] The reason why I mention that is not to make it sound real dramatic or tragic or anything. It's just that a lot of people come down here thinking that they're going to be on a burglary case or a theft case or something like that or a DWI. All of a sudden they get up in this courtroom and find out that they're involved in a death penalty case. It's no longer a situation where we all sit around and talk about how we feel about this or that over a cup of coffee or a beer or something. How do you feel about the death penalty? How do you feel about capital punishment?

It's one thing to talk about it, isn't it?

A Yes.

Q And it's another thing to find yourself in a position where you may be called upon to actually make the decision that would result in this man actually being executed. You know that they execute people. It's not like it was a few years ago when they gave people death sentences and then they never executed them. They were committed to life or something else. I'm just trying to bring [4382] things into focus for everybody an just in fairness to everybody so that they really do appreciate just how serious this situation is and then, of course, how incredibly important any decision you make would have if you serve on this jury.

Now, I've done a lot or talking. We want to know how you feel. You were asked the question about the death penalty. That was on Monday and today is Thursday and you've had a little bit of time to think about it, haven't you?

A Yes, sir.

Q Have you done some more thinking about it?

A I sure have, sir.

Q Why don't you just tell us as openly as you can how you feel about the death penalty and then whether or nut you feel you could actually be the one to make a decision that would end this man's life?

A Every since 1 was informed of the nature of the crime, 1 realize that It was time to stop talking and really think about it. I have thought about it and there is still a [4383] thinking process .going on in my mind as to what the actual reaction is because I don't guess anybody is really sure of what they would do until finally you come to that point. I'm sure, if the evidence proves that the answers are yes, then that would be a person's responsibility to answer yes to all three questions. As far as personally how I feel about, it's something that is still unclear in my mind. I have respect for life as everyboby does and sometimes that has to be put aside for a greater need of the people.

Q All right. if you could, would you expand on that a little bit and tell us flow you feel about the death penalty generally. I know you've expressed yourself a little bit to this point. I mean, do you feel there are circumstances where people ought to receive the death penalty.

A I believe in the nature of the crime, maybe possibly brutality or other evidence that pointed to that it was justified. There are some crimes which I would imagine to serve the life, out more evidence would point that this particular crime was deserving of it, [4384] then I believe it should receive the death penalty.

Q Let me put it this way: Could you tell us what you think of, what comes to your mind, as the type of case or type

of individual, the type of Defendant, where you feel that you could vote for the death penalty, that you could feel that I would be justified that somebody be legally executed? What sort of offense comes to your mind? What would it take, for example?

A At first I think of some crazy that's mentally insane. Of course that's off the top of my mind. That's basically as far as I have narrowed it down.

MR. CUNNINGHAM: I can hardly hear you.

A Should I repeat that?

Q Yes, sir.

A At the top of my list for the death penalty, I would immediately think of somebody that is criminally insane and with no hope of rehabilitation.

Q Let me just say this because I know most of the people who come down here are [4385] not lawyers and obviously are not well-versed in the law. If you were on a jury, whether it be a capital murder case or any kind of a case, and you found somebody was criminally insane, then you couldn't convict them of any offense. That's a defense. Just like that guy Hinckley who shot the president, he shot the president and everyone saw him, but you know that jury apparently believed that he was insane at the time or had a reasonable doubt about it and they found him riot guilty by reason of insanity. Do you understand, if you were on the jury, you would have to find somebody charged with capital murder not guilty by reason of insanity, so can you think, of any other example?

A Okay. I guess what I was really thinking, now that the law is clear, is just somebody that is maybe a habitual murderer or something that really needs to be taken up.

Q Let me just ask you: Do you could hear facts of a single crime that would be bad enough where you would feel a person to your way of think be deserving of the death penalty?

[4386] A I believe if the brutality of the crime was such because I have a feeling that in the commission of a crime some of the circumstances could possibly make a person react in a different manner, but nonetheless the crime is done.

Q Let's suppose you hear—you know, when you learn about a crime whether it may be a capital murder or whatever it may be, you can learn basically the three phrases that surround any event; what happens before a crime, what happens during a crime, what happens after. It's like any event. For example, if you were on a capital murder case—you see, capital murder in this particular instance, in this indictment, we have alleged a murder, that the Defendant murdered a man while he was robbing him. He was robbing somebody and then he kills them. See. That's what we would have to prove to you beyond a reasonable doubt.

So you decide in the second part of the trial whether the questions should be answered yes or no which actually results in the death sentence or a life sentence. You [4387] would be allowed to consider whether or not—what happened before the crime, what happened during the crime, what happened after. For example, was the robbery planned? Was it well planned? Who did the planning? Did the Defendant do it or did someone else do it? Did he know beforehand that he was going to rob somebody, take a gun for example and go in there, plan it all out, choreograph the whole thing? Could you consider that important?

A Yes.

Q All right. What about during the crime where you would hear about what role he had to play? Was he a bystander? Was he the look-out or the get-away driver? Was he there calling all the shots and giving all the directions and pulling the trigger? Do you see? Did he have to kill the individual? Was it necessary or could he have just walked away? Do you see what I'm gettiny at? Are those some of the circumstances that you're thinking about?

A Yes, sir, I believe so.

Q How vicious was it? Did he have to do that? Then afterwards, was he the type of person who afterwards hung his head and [4388] said "Oh my, God. What have I done? I'm sorry. I wish I could wipe it away?" Was he the type of person who just didn't care anyhow? He was just completely nonchalant, just relaxed and cool as a cucumber. If you took those thing into account, do you feel like you could learn enough about an individual form on offense where you could say possibly to your way of thinking that's the type of person that deserves the death penalty?

A I believe so, sir. Presented with the proper evidence of the crime, I do believe that I could answer the questions fairly.

Q Let me just ask you this: On question fifty-eight, you put down there—the questions is "Do you have any moral ,religious, or personal beliefs that would prevent you form returning a verdict which would ultimately result in the execution of another human being?" You indicated, yes, that you did have some personal belief or moral belief that would prevent you from doing that. Is that the way you felt on Monday or have you changed your mind or what?

A Well, after thinking about it, [4389] like I said, I have always talked about it and I've had some religious beliefs about it, but then I sort of thought about it and then—if I can go to the Bible, it say to obey the laws of man and there immediately I said, well, I should be part of the judicial process and make sure that an individual get a fair trial. If he is deserving of death or life or of innocence, then he should, I believe—I could give a fair opinion after the evidence is presented

Q Let me just ask you in all honesty, Mr. Gutierriz, do you feel like you're leaning one way or the other? Are you more likely to feel that someone ought to be spared than leaning the other way? Some people think that we should give them another chance and some people say, obviously

whatever the law says. If the facts call for it and I think it's the right thing to do, I'll just do what the law says. Do you see yourself leaning one way or the other or do you see yourself down the middle?

[4390] A I don't think so. I pretty much—as growing up, I have always been called upon every now and then to settle a matter here and there and I've learned to be unbiased and just to give my opinion of things. I believe at this point that I have no bias one way for the other.

Q You understand that we have to rely, in selecting a jury here, basically on what you tell us now. I'm just being as straight with you as I possibly can. When you came down here on Monday you said that you did have some religious feelings about it and we just want to be sure that what you tell us – I'm not suggesting that you're being dishonest with us, but that you don't change because we rely on what you tell us now and, if you got on the jury and said, well, I've changed my mind about that, I could never do that, you know, when it comes down to it, my religion and stuff, my moral feelings, my personal feelings, are such that I couldn't do it, then that wouldn't really be fair to us, would it? The same thing would hold true for the Defendant. If you say, well, you know—well, if you just change your position against him. Do you see what I'm getting at?

A Yes.

Q Now, we have to rely on what you're telling us. Do you have any reason to believe that your opinions would believe that your opinions would change between now and in the next couple of days or next week?

A No, sir. Like I say, give these few days, I've really brought it down to myself as to what would I really do. I really believe that the fair trial would the most—well, what everybody deserves and I've put aside —I still believe in what I put there, but many time you have to put aside what you believe for the sake of getting a fair trial and fair judgment.

Q Why do you think personally that some people some people ought to be executed?

A The nature of the crime, the brutality of it.

Q If they're continuously committing crimes, do you think that should enter into that decision also? In other words, if most of his life he's been committing serious crimes, do [4392] you think that's another reason, another factor, that should enter into your decision?

A I don't believe—immediately I think that kind of evidence is inadmissible.

Q Well, no. If a person is charged with a crime, in the punishment phase of the trial the jury gets to learn if that person has been convicted of other serious offense before. In other words, is this the first time he's ever done anything wrong or is he the type or person who has been violating the law all of his life or most of his life.

A If those crimes have been increasingly more and more violent, I believe that would point in that direction.

Q What sort of crimes do you think a person ought to be able to receive the death penalty for?

A Murder in the gravest circumstances, brutality and—

Q Do you feel strongly about murder?

A Yes, I do.

Q Let's talk a little bit about murder and capital murder. Murder is a

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[4452] MAX W. O'DELL

EXAMINATION

BY MR. NELSON:

Q As you may remember from Monday, my name is Jim Nelson. The man seated next to me is Paul Macaluso. There will be one other attorney involved for the State of Texas in this case and his name is Norman Kinne. The three of us are

assistant district attorneys in Dallas and we've been assigned by Henry Wade to handle this case for the State of Texas.

The man immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good afternoon, Mr. O'Dell.

Q And seated next to him is Mr. Royce West.

MR. WEST: Mr. O'Dell, good afternoon, sir.

Q These two gentlemen are attorneys in Dallas who have been appointed by Judge

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[4454] little more relaxed in this situation than you would be talking in front of forty or fifty strangers, if anybody can be relaxed sitting up on the witness stand with four lawyers staring at you. We do hope that you will relax. Understand that there are no right or wrong answers to anything we're going to ask. Were just trying to find out how you feel about some things. If you will bear with us, it gets a little tedious at times, but everything we do is necessary under the law.

Mr. O'Dell, let me tell you just right out of the box what our position is in this case, that being the State of Texas. We are actively seeking the death penalty for Thomas Joe Miller-E1. We believe we will be able to present to a jury of twelve people the type and quality of evidence to prove beyond any reasonable doubt that he is guilty of the offense of capital murder. We further believe that we will be able to present the type and quality of evidence to prove that each of three questions should be answered yes. If each of those questions is answered yes, then Judge McDowell must under the law assess a death sentence in this case and we anticipate at some point that death [4455] sentence will be carried out because we anticipate that's the way the evidence will come out. That's basically our position and what we plan to do once the trial in this case starts.

Our position doesn't make a whole lot of difference. What counts is your feelings and your position. You had a chance on Monday to fill out this questionnaire, which I've already made reference to once, and one of the questions on it was whether you believe in the death penalty. You've answered that in a little bit of detail, as a matter of fact, but I would like to ask you, if you would, to tell us in your own words, having had three or four days to sleep on it now, how you feel about the 18 death penalty and whether it serves a purpose in our society?

A Well, I feel that it does because I think it—they say that it does act as a deterrent. I think—well, capital crimes should be punished by capital verdicts. That's the way I feel about it. I think every case should be on its own merits or dismerits or

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A I believe so.
Q Any problem with that?
A I don't see any.
Q Okay. Let me talk about something that may come up. We don't anticipate that it will, but it might so I'm going just in case, I guess, so to speak. We've told you that this type of offense is called murder to go over it plus, murder plus a robbery. If we present our case and you hear all the facts of a murder and we prove to you a murder. We prove to you that a person knowingly or intentionally caused the death of another human being, out you don't hear a word about a robbery. There's no evidence at-all that there was any robbery involved at all, then it's just a murder and we haven't proved capital murder. All we have proved is the offense of murder in the State of Texas. Am I making myself clear on that?
A Yes.
Q If that's the case, then the death penalty is no longer a potential punishment.
A But you've already stated that you're going for capital murder?

Q Right. We feel like we can prove

[4472] capital murder, but murder is a lesser included offense of capital murder. If you were to decide beyond a reasonable doubt that he is guilty of murder, but that you have a reasonable doubt whether there was a robbery committed or not, then the law would require you to find him guilty of murder rather than capital murder.

A Does the Judge tell you what—

Q It's going to be up to you. You will get instructions as to what—

A He will define it?

Q Right. As to what murder is and what capital murder is. If you find this, this is murder and if you find this, this is capital murder and, if you have a reasonable doubt, he's not guilty and so on. You will be instructed on all of that. If you should find him guilty of murder rather than capital murder, a whole different range or punishment comes into play. No more death penalty. The range of punishment for the offense of murder in the State of Texas is from five years up to ninety-nine years or life and a fine of up to $10,000.00 is optional. You can assess it, but capital murder, but murder is a lesser included offense of [4473] but you don't have to.

The law says in order for you to be qualified and eligible to serve on this jury, you have to De able to consider that entire range of punishment. I'm going to get to that, but let me throw some more things into the pot while we're doing this. When we talk about murder in the State of Texas—I've told you basically the definition, knowingly or intentionally killing another human being. If it is self-defense, if you find self-defense, it's not murder. He's not guilty. If the jury were to find it was an accident, it's not murder and he's not guilty. If the jury were to find that the person was insane, then he is not guilty by reason of insanity and he's not convicted of murder. It could be a killing that is less than murder. If I came home and my little four year old daughter had been raped and

abused and the guy that did it was standing next door with a beer in his hand and actually bragging about it and I went and got my gun and blew him off the face of the earth, the jury might decide that was a killing in the heat of passion rather than a murder. If they did, [4474] I that would be voluntary manslaughter which is a different offense with a different range of punishment. Those are legal justifications and legal excuses for killing a person.

There may be things that enter into the murder scenario that don't amount to legal justifications or legal excuses. There may be provocation, but it's not enough that self-defense is found. You could hear about the prior relationship between the parties. You could hear if this is an on-going feud or if it's a spur of the moment thing and all the background to the offense. Would you agree with me, Mr. O'Dell, that there is probably a myriad of circumstances under which one person could kill another person?

A Definitely agree. I've had some of them. Some of them are bad drivers.

Q Okay. I suppose, if we sat here for the rest of the day, we could give you example after example after example of different situations where one person kills another person. We aren't allowed to do that under the law. We can't give you examples. We can't go into the facts of this case. Now, [4475] you mentioned bad drivers. If something is done recklessly, one person kills another person recklessly, that's not murder either. That's involuntary manslaughter which is another type of offense.

When we talk about murder, we're talking about the knowingly or intentionally killing of another person without any legal justification and without any legal excuse. Again, there may be some provocation. There may be some problems. There could be all kinds of things that enter into it that don't amount to legal justifications or legal excuses.

I guess what it comes down to, the way I've heard it put, he knew he was going to kill them. He intended to kill them and he killed them for whatever reason. There could be all kinds of reasons, but that's what happened. The law says you have to be able to consider that entire range of punishment for the offense of murder. We don't ask you to tell us right now that you will give life for murder or you would give thirty years or you would give five years because you haven't heard any of the facts. As you pointed out at the [4476] outset, you have to hear the evidence before you would know what you would do on any case.

The law does say, after you hear all of the facts and circumstances, then you're going to have to make a decision and the law wants you to have an open mind as to that entire range of punishment as you're listening to all the facts and circumstances. You don't even have to be able to sit there right now, Mr. O'Dell, and think of a situation where you would give a life sentence or think of a situation where you would give a five year sentence, either one. As a matter of fact, the law doesn't want you to try to think up those situations because, if you did, you've almost mentally committed yourself that I have to hear this for it to be a life sentence or I have to hear this for it to be a five year sentence. There may be another case out there that you didn't think of that deserves lire or that deserves five years.

What the law says basically is, you must be—the legal phrase is able to consider. What that means is, after you've heard all of the facts and circumstances, [4477] you've heard everything you're going to hear about the case, the facts of the case, the defendant, everything you're going to know, if you believe after listening to all those facts and circumstances that a sentence of life and a fine of $10,000.00 is appropriate in your own mind and called for by those facts, can you give it?

A I think so, yes.

Q Let's go to the other end. Again, we're talking about knowingly or intentionally killing another person, no legal justification, no legal excuse. You've found this person guilty of murder. Once you've heard all the facts and circumstances, again everything about the offense, the facts of the case, the defendant and everything you're going to know, if you believe personally in your own mind that those facts and circumstances call for and justify a five years sentence for the offense of murder, can you give a five year sentence?

A Yes.

Q Okay. Again, you don't have to be able to sit there right now and think of what those facts and circumstances would be. We [4478] have people come down here and say, I can't imagine what it would be, but—one in a million maybe would be a five year case, justify a five year sentence. Then that person may be sitting down here twenty years from now on a jury and listening to a case and say, well, I never thought I'd hear it. I never thought I'd see one, but this case calls for five years and so I'm going to give five years. That's all we ask of you, Mr. O'Dell. If you hear that case, whatever it is and whatever it may take to convince you that five years is appropriate, would you give five years?

A Uh-huh.

Q The same thing on the life sentence or the ninety-nine year sentence. It probably should take an exceptional case to justify either end of the spectrum, but if you hear a case that calls for a life sentence oased on the facts and circumstances, could you and would you give a life sentence?

A Yes.

Q Back to the same old phrase you've probably heard me use twenty times already and that's can you keep an open mind and listen to [4479] the evidence and make a decision based on the evidence that you hear?

A Yes.

Q That's all we ask you to do. That's all anybody can ask you to do.

You've probably heard about—there's been a lot of discussion about parole in the State of Texas. The law says and the judge may instruct you that prisoners in the Texas Department of Corrections can under certain circumstances earn what is called good-time which is credit against their sentence. They can also under certain circumstances be paroled before the end of their sentence. It goes on to say that is in the exclusive jurisdiction of the Board of Pardons and Paroles and the governor of the State of Texas. You can't control it. We can't control it. Judge McDowell has no control over it. It's up to the people in Austin.

As a result of that, the law goes on to say that even though you know about that, you cannot consider that for any purpose in assessing a sentence. In other words, you can't adjust a sentence to take into account

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[4526] held.)

THE COURT: Mr. O'Dell, I'm sorry for sending you in and out, but we were talking a law question. The juror has been passed, Mr. Nelson. What says the State?

MR. NELSON: Your Honor, the State of Texas would be pleased to have Mr. O'Dell as a juror on this case.

THE COURT: Mr. West?

MR. WEST: We will excuse Mr. O'Dell .

THE COURT: Mr. O'Dell, you have been excused from service in this case.

Off the record, Pam.

(Whereupon, there was an off the record discussion, after which the following proceedings were held.)

MR. CUNNINGHAM: In Cause No. F85-78660-NL, State of Texas versu- Thomas Joe Miller-El,

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[4537] SANDRA R HEARN,

called as a jury panel member sworn by the Court to testify to the truth, the whole truth and nothing out the truth, was examined and testified as follows:

EXAMINATION

BY SIR. MACALUSO:

Q Good afternoon, Ms. Hearn. I'm Paul Macaluso and this is Jim Nelson trial begins, we will be joined Norman Kinne. We're all assistant district attorneys here in Dallas and we're the lawyers for the State.

To Jim's left is Mr. Brice Cunningham.

MR. CUNNINGHAM: Hi, Ms. Hearn.

Q To Mr. Cunningham's left is Mr. Royce West.

MR. WEST: Ms. Hearn, good afternoon.

Q They're the defense attorneys who have been appointee; by the Court to represent the man charged with capital murder, the Defendant. His name is Thomas Joe Miller-El.

* * * *

[4539] one, we want you to relax. There are no right or wrong answers to any of the questions we're going to be asking you. No one s going to quibble with you or quarrel with you or pick, argue with you, change your rind or try 6and talk you into anything. You just tell us what is on your mind and the way you honestly feel, you see, and you will be doing your job. If we ask the right questions, we will be doing our job. If you have a question at all at any time, don't be bashful. You ask the question. If there is something that you need to tell us, the same thing. You just say what is on your mind, whether we come within a country mile of it or not. Your

opinion ultimately, I hope you understand, is what we're really seeking at this time. I'll blab on here sometimes and it will seem endlessly, but that's not the important thing. We want to know how you feel.

Now that I've said that, let me tell you how we think about one thing, what our position is. This is very important, that you know right off from the very outet what our position is regarding this case based on the evidence and the law. We are actively seeking [4540] the death penalty in this case for that man at the end of the table. We know that the law allows for it under certain circumstances and we feel we will be able to provide a jury once it is selected with the type and qualify of evidence that would reasonable doubt as Defendant Thomas Joe Miller-El capital murder precisely this indictment. That's done in the first of the trial.

In the second part, once again we have the burden of proof and the law would require us to provide the jury with the type and the quality or evidence that would convince then beyond any reasonable doubt that the questions should be answered yes. You know the result of all yes answers in a capital murder case is a mandatory sentence of death. Am I leaking myself clear?

A Yes.

Q That's just our position. Everyone has a position, as the old saying goes. But we want you to know in this type of a case that; we ace actively seeking the death, [4541] penalty. Ultimately it is the decision or the jury that ready counts and really will prevail, so that's wily we need to talk to you and see how you feel.

Now, you were asked tills question here the other day about—you were given precious little preparation and tine, you know, three lines, how do you feel about the death penalty. Why don't you just tell us or snare with us in your own words how you do feel about the death penalty and

secondly, any reason that you know of why you couldn't actually sit on a jury of this type and render a decision if called upon to do so that would result in the execution of another individual?

A. Okay. I believe in the death penalty if a criminal cannot be rehabilitated and continue to commit the same type of crime. I do not think anyone should be sentenced to a death penalty on first offense. I do not see any reason why I couldn't sit on a jury when you're imposing a dealth penalty.

Q In other words, you can believe in the death penalty?

A Yes.

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[4563] sentence unless we convince you that those questions should be answered yes. Can you do that?

A Yes.

Q Let's shift gears here for one second. Let's suppose for example that you're on a capital murder jury and you've found somebody—you've heard a capital murder case where the indictment alleges a murder during a burglary. That's one type of capital murder. We prove the murder, but we don't prove the burglary aspect of it. You understand that we would be required to prove both, the murder and the burglary. If that were to happen and you're on the jury, you would have to find that that defendant not guilty of capital murder because we didn't prove capital murder, did we? What did we prove?

A Murder.

Q If that were to happen, you can forget all about what we talked about, life or death, because those are not penalties for the offense of murder. The law in Texas sets out the very, very, very, broad range of punishment for a person convicted of murder, not capital [4564] murder, but what we will call regular murder. That range is as broad as it for any offence in Texas. It's form five years to ninety-nine years or life. The reason for that is, I think you can understand, the law allows

and takes into consideration that there are an infinite number of circumstances where one person can commit the offense of murder. Would you agree with me?

A Yes.

Q You have to take it on a case by case basis. The law gives you that latitude as a reasonable open-minded person to say I'll follow the law an dif the law is from five years to ninety-nine years or life, I'll consider that. I keep an open mind to that full range of penalty and I will wait until I hear all the evidence in a murder case. I don't care, I'm not going to prejudge anyone. I'll just wait and listen. If I hear a case that calls for the maximum and I think it is proper and the right thing to do based on all the circumstances and all of the evidence that I hear, I'll give it. If I hear a case to my way of thinking deserves, warrants and calls [4565] for the minimum, because I think that's the proper thing to do based on everything I learned, you know, once I hear the evidence, I'll give that whether it be five years on the bottom or ninety-nine years of the top of a life sentence. Would that be fair enough?

A Yes.

Q Can you do that?

A Yes.

Q In other words, you have an open mind and would continue to keep an open mind?

A Yes.

Q Now, we all know that murder is a situation where one person knowingly or intentionally causes the death of another. It's not self-defense. It's not an accident and we all know that. It's not aninsanity situation. It's not a crime of passion whee someone acts in a rage of sudden passion or a crime of passion like a father killing—

MR, CUNNINGHAM: Your Honor, we would object to counsel giving the juror specific factual example.

THE COURT: I'll overrule [4566] the objection to that particular —as I understand it, you're giving an example of what might constitute an offense and not in regards to any kind of punishment that this juror might assess?

MR. MACALUSO: That's true, Your Honor.

MR. CUNINGHAM: note our exception.

Q Do you see what I'm getting at?

A Yes.

Q All we're expecting you to do, which is what you said you can do, is number one follow the law because you respect the law. Am I reading you correctly?

A Yes, sir.

Q Do you have an open mind?

A Yes.

Q Will you continue to keep an open mind throughout a trial if you're on a murder case and wait until you've heard all of the evidence?

A I would try.

[4567] Q In other words, you haven't closed your mind to the minimum of the maximum for the offense or murder, the maximum penalty, have you?

A No.

Q It may be different for you to give ninety-nine years or life for murder, but would you do it?

A Yes.

Q You would have hear special facts before you feel it would be actually warranted, ninety-nine years or life?

A They would have to be proved guilty.

Q And then it would have to be very special aggravated facts, wouldn't it?

A Right.

Q. The same thing would hold true for the minimum, wouldn't it? Before you would give five years for murder, you would have to hear special facts, wouldn't you?

A Yes.

Q But if you felt it was proper to give five years for the offense of murder, would you give five years for murder after [4568] you've heard the evidence?

A Yes.

Q Let me talk about one of two other things here now. One is—and this is going to be kind of strange because the law and the Judge would actually tell you, if you serve on a murder cae and found somebody guilty of murder, the Judge would instruct you as to the range of penalty. The he would talk to you about what we all have heard about. That's parole. The Judge would instruct you and tell you that there is such a thing and there's such a thing at the Texas Department of Corrections calls good-time and a person who is sent to the penitentiary can acquire accumulate good-time—they call it for good behavior time—toward parole. Now the Judge would instruct you as to that and then he would go on and tell you that the decision as to any kind of parole matter is not his decision and it's not your decision. It's exclusively within the responsibility of the Texas Board of Pardons and Paroles and the governor. On the one had the Judge is required by law to instruct you about parole and then the next thing he says,

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NEWS

RACE BIAS PERVADES JURY SELECTION

Prosecutors routinely bar blacks, study finds Series:DISCRIMINATION IN JURIES

Steve McGonigle, Ed Timms

1986, The Dallas Morning News

Dallas County prosecutors routinely have excluded nine out of 10 blacks qualified to serve as jurors, perpetuating a decades-old pattern of racial discrimination on felony juries.

For four out of five black defendants, the selection process means that the constitutionally guaranteed impartial jury of their peers will be an all-white jury.

An eight-month investigation by The Dallas Morning News shows that prosecutors routinely manipulate the racial composition of juries through their use of peremptory challenges—legal objections that allow lawyers to dismiss prospective jurors without explanation.

District Attorney Henry Wade, however, denied that his assistants exclude prospective jurors solely because of race, although he acknowledged that race may be a factor in whom they dismiss. Prosecutors, Wade said, act within the spirit of the adversary legal system to exclude anyone if they believe it will give their client—the people of Dallas County—"a fair trial.'

While blacks comprise 18 percent of Dallas County's population, The News' analysis of 100 randomly selected felony trials found that fewer than 4 percent of jurors were black. In fact, the chance of a qualified black serving on a jury was 1-in-10, compared to a 1-in-2 chance for a qualified white.

Of those blacks struck from juries by peremptory challenges, the study found, 92 percent were barred by prosecutors. Blacks were excluded from juries at almost five times the rate of Anglo jury candidates and twice as often as Hispanic candidates.

Several legal experts characterized the findings as showing that Dallas County prosecutors are engaging in a "systematic exclusion' of black jury candidates that violates not only the defendants' right to a fair trial, but also the right of black citizens to participate equally in administering justice.

Defense attorneys contend prosecutors, while picking what they perceive will be the most conviction-prone juries, are ignoring their legal duty to uphold justice.

"I think that the black population, being a significant portion of Dallas County, is being totally discriminated against, and if I were a black person I'd be up in arms about it,' said Dallas defense lawyer Kerry FitzGerald, head of the Texas Criminal Defense Lawyers Project

Wade, Dallas County's chief prosecutor for 35 years, said that in some cases, he believes blacks may be "more likely' to convict defendants than those who actually are selected for juries.

"I'm frankly trying to get more on (juries)," Wade said of blacks. "We don't take them on just to balance the jury."

City Council member Al Lipscomb, an outspoken critic of jury selection in Dallas County, charged that prosecutors are using "racist tactics' that alienate blacks from the judicial system.

"The criminal justice system itself should be indicted here in Dallas for tampering with the law, for tampering with the rights of citizens," said Lipscomb, one of two black members on the City Council.

The U.S. Supreme Court has ruled that systematic exclusion of an identifiable group of potential jurors is unconstitutional. It has reversed criminal convictions on such grounds—including three cases from Dallas County in the 1940s in which racial bias in the selection of grand jurors was alleged.

FitzGerald contended that "stacking" the racial makeup of juries denies defendants of all races their constitutional right to have their fates determined by a representative cross section of the community.

Increasingly, similar arguments are being voiced throughout the nation. Supreme courts in four states and three of the 11 federal circuit courts of appeal, for example, have modified peremptory challenges because of concern about their racially biased use by prosecutors.

In Texas, prosecutors and defense lawyers each have 10 peremptory challenges in non-capital felony trials. The peremptory challenge allows lawyers to cull prospective jurors without having to give cause.

The U.S. Supreme Court is studying the "cross section argument'—that defendants have a right to a trial by a representative section of the community—in a Kentucky case to decide whether to modify a controversial 1965 decision that permits racially based peremptory challenges in individual cases.

The court stated in Swain v. Alabama that a prosecutor's use of his peremptory challenges is not unconstitutional unless he uses them "in case after case" to exclude blacks for no reason related to any trial strategy.

Critics of Swain contend that it gives prosecutors free rein to exclude blacks and imposes an impossible burden on defendants to prove unconstitutional exclusion because of the lack of records identifying potential jurors by race.

Arch McColl, president of the Dallas County Criminal Bar Association, said The News' study exemplifies the type of race discrimination by state action that the high court consistently has condemned. It also demonstrates, McColl said, that prosecutors still adhere to jury selection guidelines suggested in a controversial 1969 paper.

The paper, written by then-Assistant District Attorney Jon Sparling, noted that minorities "almost always empathize with the accused" and therefore do not make good jurors for the prosecution.

"You are not looking for a fair juror," Sparling advised in the paper, which later was made part of a manual for Texas prosecutors, "but rather a strong, biased and sometimes hypocritical individual who believes that defendants are different from them in kind rather than degree."

Sparling, now a candidate for the Republican nomination for district attorney, said he was repeating "the conventional wisdom of the time" and that he no longer believes the guidelines are valid.

"I don't see that there is a good reason, and I don't think there's ever been a good reason, to systematically exclude blacks" Sparling said.

State District Judge Larry Baraka, a former prosecutor and the county's first black felony court judge, said The News' findings also demonstrate the failure of judges and defense lawyers to stop the exclusion of qualified blacks from jury service.

"I'm in shock,' Baraka said. "I thought things had gotten a lot better, but apparently they haven't."

Wade said his assistants are trained to use their peremptory challenges to dismiss potential jurors they believe will empathize with the defendant. He said, however, that not all

his assistants may use their peremptory challenges intelligently.

"You're trying to get either a completely unbiased juror or one that may be biased in favor of the state," said Wade, who is not seeking re-election. "And I suspect a lot of those (blacks) being cut would probably be better jurors than the ones they end up with"

Wade suggested that the high rate of black exclusion revealed in The News' study might stem from a disproportionately large number of blacks who express doubt about assessing maximum punishments or who have personal knowledge of criminal cases.

Wade said he was not convinced by The News' findings that his assistants engage in an illegal, systematic exclusion of blacks. "It indicates, maybe, that,' he said.

The News' study is based on a computer analysis of Dallas County court records from 100 felony jury trials conducted during 1983 and 1984. The trials were selected at random from among the 1,036 trials held during that period.

The study examined records on 4,434 prospective jurors to determine the racial composition of juries, as well as the race of persons excluded from jury service by judges, prosecutors and defense lawyers.

Among the major findings of the study are:

- Juries in 72 of the 100 trials had no blacks. Of the 28 juries with black members, eight sat in judgment of black defendants while 20 decided the fate of Anglo and Hispanic defendants.

- Only two of 54 black male defendants included in the study were tried by juries that had black males. None of the seven male Hispanic defendants had a male Hispanic juror. All 38 Anglo defendants had a majority of Anglos on their juries.

- Of those blacks eliminated from jury service by peremptory challenges, 92 percent were struck by prosecutors. Four percent were excluded by defense lawyers, and 4 percent were dismissed by both sides. (Neither side knows the other's challenges until the judge receives them at the end of the preliminary examination.)

- Forty-seven Hispanics and 46 blacks served on juries, although the number of blacks summoned for jury duty was five times greater than the number of Hispanics.

- The percentage of blacks disqualified from jury service by judges was 1 1/2 times the percentage of disqualified Anglo or Hispanic jury candidates. However, blacks were excluded by prosecutors at almost five times the rate of Anglo jury candidates and twice as often as Hispanic candidates.

Prosecutors maintain that blacks themselves are partly responsible for their under representation on felony juries because many disqualify themselves by saying they cannot judge others or consider a life sentence in cases where state law provides such punishment upon conviction.

Under Texas law, prospective jurors who say they cannot follow the law because of personal convictions or bias are disqualified for "cause."

After those disqualified are dismissed by the judge and both sides exercise their peremptory challenges, the first 12 people who remain are chosen to sit on the jury.

Peremptory challenges, in varying forms, have existed since the 13th century in English law. Historically, they were granted only to the defense in a criminal case. It has been in the last century in the United States that prosecutors were granted the right to exercise such challenges.

Defense lawyers argue that the use of peremptory challenges by Dallas County prosecutors to exclude blacks from juries stems from a racial stereotype that blacks are less inclined to convict and assess harsh penalties.

The stereotype has been passed from generation to generation of prosecutors and is particularly acute in Wade's office, defense lawyers say, because of its heavy emphasis on conviction rates as the means for earning promotion.

"You don't get hired unless you can play that game, and you certainly don't progress," said Vincent Perini, president of the Dallas Bar Association.

"What they are, really, is a bunch of SMU frat rats who are, you know, putting in a little postgraduate work down there kicking nigger ass before going on to the real world, the respectable world, the Dallas Country Club and the civil law firm," Perini said.

Norman Kinne, one of Wade's top three felony prosecutors and a member of his staff for 14 years, strongly denied Perini's characterization of the district attorney's staff.

"I can't believe the elected president of the Dallas Bar Association, in one fell swoop, manages to insult Southern Methodist University, fraternities, the black race, the Dallas Country Club and all civil law firms," Kinne said.

"However, we have tried over the years to provide, under Mr. Wade's guidance, professional prosecution of which all citizens may be proud. The record of this office and the quality of life in Dallas speaks for itself."

Baraka said stereotyping blacks as being less inclined to convict and assess tough sentences is "absurd."

"Skin color has nothing to do with the process of your damn brain," he said.

Defense lawyers say the practice of excluding blacks has diminished as the number of black prosecutors in Wade's office has increased, but they say that even black prosecutors succumb to the pressure to win at all costs. Eight of the 42 felony court prosecutors on Wade's staff are black.

Black lawyers, in particular, maintain that blacks, more than whites, have more reason to dislike criminals because of the higher crime rate in the black community.

"People, be they black, white or brown, are tired of crime; they're just tired of it," said Royce West, a black former prosecutor and a Democratic candidate for district attorney. "I think that when blacks and browns are systematically included on juries that they will give stiffer punishments."

Added defense lawyer Frank Hernandez: "Blacks, Mexican-Americans, women are just as tough, if not tougher, on a defendant who meets their minority status because they look upon that person with some sort of anger sometimes: "You are causing our whole group to be looked upon in this (bad) way."

"Just because you're black doesn't mean that if the defendant is black he gets away," said Hernandez. "Blacks don't like to be shot at in 7-Elevens any more than anybody else. Nor do Hispanics like to be burglarized."

The practice of prosecutors excluding blacks is so commonplace that defense lawyers say they routinely incorporate it into their trial strategy, rarely dismissing even prosecution-minded blacks, anticipating that prosecutors will use one of their peremptory challenges to do the job for them.

In The News' study, only 3.3 percent of the peremptory challenges exercised by defense lawyers were against blacks; 2.5 percent were against Hispanics. Ninety-four percent of the defense strikes were exercised against Anglos.

Dallas County Public Defender Ralph Taite said he routinely warns black clients that they will likely face "a white jury composed of housewives, sometimes rednecks, a lot of middle-class people who come from the suburbs, who have very little contact with them."

"There's not going to be anybody on that panel who's going to be able to say, "Yeah, that's the way it is over in South Oak Cliff, or South Dallas, or West Dallas," Taite said.

The only time blacks get on a jury, defense lawyers contend, is when there are too many white non-conformists who appear to prosecutors to be even worse risks.

"You get about 12 hippies and 14 painted-up women and a bunch of cab drivers and bartenders, and they (prosecutors) will be inclined to take chamber of commerce-type blacks—you know, business-looking, good background with job," said veteran defense lawyer Charles Tessmer.

Defense attorney Richard Aguire said The News' findings that Hispanics serve on juries in a greater proportion than blacks confirms observations that prosecutors prefer Hispanics over black jurors.

The reason, Aguire said, is that prosecutors believe Hispanics will follow the lead of the Anglo majority on a jury. According to defense lawyers, prosecutors also believe that Hispanics will not favor black defendants because of what prosecutors perceive as historical antipathy.

Members of the judicial system argue the impact that exclusions of minorities have on sentencing, but many agree that the practice has a wide-ranging impact on the appearance of justice in Dallas County.

The threat of an all-white jury prompts some black defendants to waive their right to a trial and seek a plea bargain, lawyers say; other defendants change their pleas after learning that their jury contains no member of their race.

"Black people don't like to go to trial, regardless . . . They don't believe they're going to get a fair trial from white people," explained defense lawyer Carl Gaines, the second black prosecutor hired by Wade.

Nor does the impact of black exclusion stop with defendants. Blacks called for jury service say the absence of blacks on juries causes them to question whether the judicial system is color-blind.

Many families of defendants leave the courtroom believing they have witnessed "white man's justice," said Peter Lesser, a defense attorney and a Democratic candidate for district attorney.

"I think that hurts the judicial system because then they're not concentrating on the fact that Johnny is a no-good scumbag who beat up this old lady, stole her purse, put her in the hospital and nearly killed her," Lesser said. "They're concentrating on the fact that, well, it's racist."

Jessica Guillory was one of nine black potential jurors summoned in February for a case involving a black woman charged with welfare fraud. Mrs. Guillory said she felt intimidated after watching the panel reduced to an all-white jury.

"It made me know that I better not ever get in trouble, that I don't feel like justice is all it's supposed to be," said Mrs. Guillory, one of six blacks dismissed by the state.

Baraka said blacks have been so conditioned to expect unfairness from the justice system that many do not consider jury service a possibility.

"As a defendant, we don't stand a chance. We're arrested more often, we're convicted more often, we receive more punishment. I mean, those are just the facts," Baraka said. "And as honest, law-abiding citizens who believe in God and

the American way and pay taxes to send our children to school, we're still told we're not anything of value."

West, a defense attorney, said that even black professionals contemplate ignoring a jury summons, believing that because of their race, their opinions are not wanted by the justice system. "There's no sense going down there (to the courthouse) because they're going to strike them just because they are black," West said.

Still other blacks have a more visceral reason for avoiding jury service, according to state District Judge Ed Kinkeade, who oversees operation of the central jury pool.

"They tell me, "I'm afraid of the courthouse; nothing good happens at the courthouse, and I don't want to be a part of it," Kinkeade said.

Racial discrimination in jury selection in Dallas County dates back at least to the 1930s when riots narrowly were averted after blacks appeared at the courthouse, insisting they be considered for jury service. In 1938, a black college president was thrown head-first down the courthouse steps by two white men when he refused to leave the central jury room.

In the 1940s, the U.S. Supreme Court, in three separate cases, told Dallas County that its method of selecting grand jurors was unconstitutional because it intentionally excluded blacks.

Evidence presented to the Supreme Court in one Dallas case in 1942 showed that no black ever had served on the Dallas County grand jury. Two grand jury selection officials said they had not summoned any blacks because they knew of no qualified black in the county, which then had 55,000 black residents.

The law was then the most common form of exclusion. Most blacks were simply disqualified from jury service

because, in order to be an eligible juror, a person must have paid a poll tax—a required fee for voting—and be a property owner.

Blacks who did qualify for jury service in Dallas County were rarely served with summonses; those who were served and appeared at the courthouse frequently were told by judges that their services were not needed.

Not until 1949 did a black serve on a trial jury in Dallas County, 81 years after blacks were granted full rights as citizens by the 14th Amendment to the U.S. Constitution.

When Wade took office as district attorney in January 1951, he said, he made it a priority of his office to prosecute more crimes against blacks, because of the higher crime rate in predominantly black neighborhoods. That policy has remained a priority ever since, Wade said.

However, Wade said he has never had a policy of preventing blacks from serving on juries and has seated blacks on juries as far back as the 1950s.

But state District Judge Jack Hampton, who served on Wade's staff from 1958 to 1962, recalled being reprimanded by Wade when he allowed a black woman to serve as a juror on a misdemeanor drunken driving case. The case ultimately ended in a mistrial because the woman could not reach a verdict.

"If you ever put another nigger on a jury, you're fired," Hampton quoted Wade as saying. "That was the way things were back in 1958."

Said Wade: "That didn't happen, so far as I'm concerned.'

Hampton said he did not put another black on a jury for the remainder of his career as a prosecutor.

Five years later, a treatise on jury selection credited to Assistant District Attorney Bill Alexander, then one of Wade

top aides, reiterated the belief that certain minorities were not appropriate state's jurors.

"Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated,' Alexander advised prosecutors. "I may like these people, but they will not do on juries."

Alexander, now a federal prosecutor in Dallas, said he accepted blacks as jurors when he was in Wade's office and does not remember writing the treatise that advised against selecting minorities. "I just won't take responsibility for that," he said.

In 1963, when the treatise appeared, the number of blacks appearing for jury duty remained small. But by the end of the decade, that number was increased significantly with the abolition of the state poll tax in 1966 and the advent of a new law designating voter registration lists as the source lists for juries.

It was then, according to defense lawyers, that prosecutors began in earnest to exercise their peremptory challenges against blacks.

In 1969, Sparling, then an assistant district attorney, delivered what became a highly publicized speech to a training session for prosecutors. Sparling's suggestions on jury selection, in fact, were the subject of a Time article in 1973 that carried the headline: "Women, Gimps, Blacks, Hippies Need Not Apply."

In addition to minorities, Sparling's recommendations warned against selecting "free-thinkers,' people with physical afflictions and the overweight—especially women and young men.

Wade and his assistants maintain the Sparling manual never was followed blindly and never has been read by most current prosecutors. They insist that prosecutors are trained to

make individual decisions on jurors based on a combination of demographic factors and personal observations.

"Why do I want 12 white people on a jury when one of them is a person who's been unemployed for a while or not much of a work record, and came to court without a coat and tie, and you struck this young black business executive just because he was black?" said Jerry Banks, formerly one of Wade's top assistants. "That's dumb."

Any prosecutor who allowed his racial prejudices to interfere with his judgment in selecting the best possible jury, Banks said, would not have lasted long in Wade's office.

Defense lawyers claim that prosecutors with the least experience are the most likely to rely on stereotypes handed down by more experienced prosecutors.

"If Douglas MacArthur wrote his memoirs on the campaign in the South Pacific and you wanted to be a great general, what would you do?' asked Aguire, a former prosecutor. "If you're an inexperienced prosecutor, you do what the old master says."

The process of culling black jury candidates is apparent almost every Monday in the Dallas County Courthouse. Dozens of blacks, along with other potential jurors, enter the central jury room and later are sent to a felony court for jury questioning. But when the jury is seated, blacks more often than not are left sitting in the audience.

Inside the courtroom, prosecutors commonly exercise peremptory challenges against blacks who voice similar views and appear to possess similar qualifications to whites who are selected on the jury.

The News witnessed prosecutors repeatedly dismissing black professionals in favor of blue-collar whites, even though the whites may not have lived in the county as long.

The practice was particularly pronounced when the defendant was black.

Selecting a jury, lawyers agree, is part gamesmanship and part psychology, with each sides attempting to guess how the other will use its 10 peremptory challenges to sculpt a jury of people most inclined to favor its side of the case.

And while the intent behind the law allowing peremptory challenges is to obtain an impartial jury by eliminating signs of partiality, lawyers on both sides scoff at the notion that fairness motivates their use of the challenges.

"Anybody who tries to sugar-coat it by talking about fairness and justice and equality is just talking through his hat," said defense lawyer Mel Bruder. "We want people who are going to look at that case with prejudiced eyes."

The means of identifying potentially hostile jurors can be as straightforward as listening to candidates' responses to questions, or as subtle as observing the quickness of the person's gait or the style of his hair.

Stereotypes, superstitions and instincts are integral parts of the selection process, lawyers admit, because of the limited time available to question potential jurors and the sparse biographical information provided on each candidate.

Opinions on whom to exclude are not scientific.

Alexander, one of Wade's former top assistants, for example, promulgated a policy that came to be dubbed "The Alexander Rule." It advised prosecutors to exclude any person whose profession begins

with the letter "p"—including plumbers, painters, prostitutes and pimps. Alexander also advised against selecting "Yankees . . . unless they appear to have common sense," "queers' and "anyone who has ever lived in California."

Defense lawyer Tom McCorkle, a native of Highland Park, said he habitually uses peremptory challenges on persons belonging to any group "I loathe."

"Republicans and people from the Park Cities, my own flesh and blood, you know, I wouldn't have on a jury,' McCorkle said. "I'm prejudiced about that, have bad feelings about them.'

Other defense lawyers say they routinely use their peremptory challenges to exclude police officers, retired military personnel, bankers and Lutherans, all of whom traditionally are viewed as prosecution-oriented. They say they look for open-minded people and "virgin jurors" untainted by exposure to the judicial system.

Prosecutors, on the other hand, say they look for conservative people with a stake in the community. Indicators of stability, they say, are a person's job, his family makeup and his personal appearance.

The current instructional manual given prosecutors by the Texas District and County Attorneys Association suggests that it is not advisable to select potential jurors with multiple gold chains around their necks or those who appear to be "free thinkers."

What distinguishes defense practices from prosecution practices, according to defense lawyers, is that prosecutors use their legally constituted peremptory challenges to accomplish an illegal result—the disenfranchisement of blacks from jury service and the perversion of the guarantee of a jury of peers.

The result, they maintain, is that justice is skewed because an entire segment of the community is prevented from voicing its opinions on what constitutes justice in any individual criminal case.

The absence of blacks, lawyers say, deprives juries of a variety of perspectives and insight into human behavior, sometimes forcing white jurors to rely on stereotypes and biases in determining the fate of defendants.

"They are incapable of empathizing and unlikely to sympathize," defense lawyer Tim Banner said of all-white juries. "They haven't lived inside a black skin. They don't know what it's like."

The racial composition of a jury can be particularly critical in cases in which the state's evidence is primarily circumstantial, such as the identification of eyewitnesses.

Defense attorney Ed Sigel represented E-Systems engineer Lenell Geter in a celebrated armed robbery case that raised the specter of racial prejudice in the Dallas County's justice system. Sigel contended that white witnesses had more credibility with Geter's all-white jury than Geter, a black.

Every black eligible to serve on Geter's jury was dismissed by prosecutors, Sigel said.

"What they thought was, Geter was just another black young fellow that was out robbing," Sigel said. "There's no question in my mind that if he were a white engineer, they would not have dealt so harshly with him and they probably would not have found him guilty. They would have listened to the evidence."

Geter was found guilty of armed robbery and sentenced to life in prison. However, he was released after the district attorney's office agreed to give him a new trial, based on allegations of irregularities in his trial. Ultimately, all charges against Geter were dropped, after eyewitnesses identified another black man as the robber.

Racial makeup also can affect the tone of deliberations.

Defense lawyer Ron Goranson recalled a recent trial in which he defended a black man accused of murder, and

overheard one member of the all-white jury discussing potential punishment for his client.

"Look, I already agreed with you not to find the nigger guilty of murder," Goranson quoted the man as telling his fellow jurors, "but I'm not going to let you talk me into giving him probation."

Opinions about the effects of a jury's racial composition on the verdict rendered are almost as varied as the opinion-givers. Some defense lawyers contend all-white juries tend to punish black defendants more severely; some say white juries are not as tough, particularly in crimes among blacks.

Most judges say juries, regardless of the racial makeup, almost always "do the right thing."

Texas criminal case law shows that few cases have raised the issue of race-biased jury selection on appeal. In cases that have raised the issue, state appeals courts did not find reversible legal error. Those cases that have been overturned have been reversed by federal appeals courts.

Trial court judges acknowledge that the practice of prosecutors excluding blacks is common, but they contend that they have no authority to interfere with the exercise of peremptory challenges.

"A judge has no role in directing the prosecutor or the defense lawyer to do their peremptory challenges, or not do their peremptory challenges, in a particular manner," said state District Judge Richard Mays.

Kinkeade and Baraka, however, said judges can prevent systematic exclusion through informal means by telling prosecutors they will not tolerate such behavior.

Last year, for example, Baraka barred one prosecutor from selecting juries in his court, he said, when the lawyer did not give an adequate reason for excluding all black members of a jury panel.

In more than a dozen trials in Dallas and elsewhere in the state, The News observed only one defense lawyer complain about jury selection being racially biased. The lawyer, John Stauffer, complained that prosecutors denied his client a jury of her peers by dismissing all eligible blacks from the jury panel.

"This is not due process, it is not constitutional, it is against God," Stauffer said after the trial.

No lawyer representing a black defendant questioned potential jurors about possible race bias before a jury was selected.

Defense lawyers in the trials said they did not raise the race issue because they did not want to anger the jury panel and because they said they did not believe even the most racist person would admit his bigotry.

But other lawyers said they consider it critical to ask prospective jurors whether the defendant's race will affect their ability to be fair. Some lawyers say that merely raising the issue can defuse racist tendencies in jurors.

"If you have a black defendant and a white complaining witness and you don't ask about racial prejudice, you ought to have your bar card jerked that very day," said defense lawyer Richard Corbitt. "I think it's malpractice."

Still other defense lawyers say that while they do not approve of the way prosecutors exclude minorities with peremptory challenges, they do not want to risk losing their ability to dismiss whomever they choose.

"It goes back to the old, old quote out of the (Texas) Court of Criminal Appeals. He may strike as many blows as he wants but they must be fair blows," said Bruder, a Dallas defense attorney.

"And if all he (the prosecutor) is doing is striking blows for the state by excludo I don't think are going to do a good job

for my client—I'm in a hard position to criticize him for it,' Bruder said.

Baraka said racially discriminatory jury selection is not strictly a legal issue. "Morally, it's wrong because black people are people, and they pay these people's salaries with their tax dollars.

"They (prosecutors) are supposed to be protecting the interests of all citizens. And how can they protect their interests if you won't take them into the system?"

Defense lawyer Henry Ackels noted that laws can change.

"It wasn't until 1963, 175 years after the Constitution was adopted, that the courts said everybody has a right to have a lawyer . . . . It wasn't until Brown v. Board of Education that the courts decided everybody had a right to an equal education," Ackels said.

"Sometimes, it takes 200 years before we start waking up to a constitutional right that we've had all the time.'

TABULAR OR GRAPHIC MATERIAL SET FORTH IN THIS DOCUMENT IS NOT DISPLAYABLE

1-2 CHARTS (Credit: The Dallas Morning News Source: Based on a News analysis of 4,434 prospective jurors called for potential service in 100 felony trials in 1983-84. The 100 trials were chosen randomly.) 1.HOW DALLAS COUNTY JURIES BECOME VIRTUALLY ALL-WHITE RACIAL MAKEUP OF DALLAS COUNTY TRIAL JURIES **PHOTOS** 1. Jon Sparling (No credit given) 2.Larry Baraka (No credit given) 3.District Attorney Henry Wade denies that his assistants use race as the sole factor in excluding people from juries. (Credit: The Dallas Morning News) 4.Robbery charges against Lenell Geter were dropped in 1984 after he served 16 months in prison. Prosecutors had dismissed all of the black prospective jurors before his trial. (Credit: The Dallas Morning News/David Woo);

LOCATION: Charts - NR. Photos: 1. Sparling, Jon. 2. Baraka, Larry. 3. Wade, Henry. 4. Geter, Lenell.

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IN THE CRIMINAL DISTRICT.COURT NO. 5
OF DALLAS COUNTY, TEXAS

[Filed April 14, 1996]

CAUSE NUMBER F85-78660-NL

THE STATE OF TEXAS

v.

THOMAS JOE MILLER-EL

PRE-TRIAL HEARING

APPEARANCES:

THE HONORABLE NORMAN KINNE,
THE HONORABLE JIM NELSON
THE HONORABLE PAUL MACALUSO
Assistant District Attorneys Dallas County, Texas

[Filed November 20, 1996]

FOR THE STATE OF TEXAS

THE HONORABLE E. BRICE CUNNINGHAM

THE HONORABLE ROYCE WEST
Attorneys at Law Dallas, Texas

FOR THE DEFENDANT

BEGINNING on the 12th day of March, A.D., 1986, the above entitled and numbered cause came on for hearing, THE HONORABLE PAT MC DOWELL, Judge ,presiding, and the following proceedings were had, to-wit:

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(News clips of tv news of 3/12/86 were offered without benefit of an exhibit number, and there was no actual, tangible evidence.)

* * * *

[1] PROCEEDINGS

THE COURT: This is the State of Texas versus Thomas Joe Miller-E1 on various motions. Both sides ready?

MR. NELSON: State's ready, Your Honor.

MR. CUNNINGHAM: The Defense is ready, Your Honor.

THE COURT: I think the first thing I probably ought to take up is a motion on behalf of the Dallas Morning News filed by Mr. John McElhaney to quash the subpoenaes issued in this case. Mr. McElhaney, may I hear you? I might as well dispose of that.

MR. MC ELHANEY: The motion we filed is based. on the first amendment to the United States Constitution, and article 1 section 8 of the Texas Constitution regarding freedom of the press. Very simply, the Motion To Quash the Subpoenaes was filed because the balance which needs to be struck between the sixth amendment right to call witnesses on the part of the criminal accused and the first amendment freedom of the press, at first blush do conflict, in the sense that the

press desires not to have their time taken up in research incorporated by litigants of either side in cases in which the press is not a party. On the other hand, we realize that the accused has a right to subpoena witnesses. [2] So, that the approach used by the Courts is to balance necessary competing interests. And one of the fundamental tests under the Constitution in this area is whether there are less intrusive means on the part of the party who wants the information to obtain that same information, and if so, then the first amendment privilege carries. If not, then there's a balancing, weighing test that the Court can use. And we realize the privileges of the press are conditional privileges. Our position here, very simply and I think very correctly, is that this 'is a very clear case where the defendant issuing the subpoena has not satisfied the test, even prima facie, because the information sought on the face. Of the news article referred to in the subpoena appeared in the Sunday March 9, 1986 Dallas Morning News article; which on its face purports to be a report on a study of court [3] records. These are official court records, the Dallas Morning News had no special access to these, these are available for anybody to look at, for anybody to do their own compilation in any manner they want. So, subpoenaing a reporter in a case like this erely to rehash the work that they did in analyzing public records we think is, in fact, an abuse of the privilege. The United States Supreme Court in a case, Bransburg versus Hayes, I think has some language that very clearly illustrates the problem the press has here. That is, they said, "We do not hold that litigants are free to, quote, annex the news media as their own investigative arm." That's in effect what has happened here, the defendant has tried to annex the research, and expertise, and work of the Dallas Morning News to make them his involuntary investigator. That's where the Courts, I think unanimously, are willing to draw the line as a practical matter. This article came out on Sunday, this is the very first week since then that the article has been out. We can

anticipate that we could be bombarded with requests, not only [4] here in Dallas County every Monday morning for jury selection, but throughout the entire state. And the tying up of the reporters and making them involuntary experts for either side in litigation is, in fact, an interference with their news gathering efforts. Because, instead of being available to properly report news, these reporters stood by yesterday morning, in fact were here at the courthouse yesterday morning from these subpoenaes. Mr. Cunningham-said, "Well, come on back tomorrow, we'll have them on stand by." So, here they are standing by being detained and diverted from their ordinary reporting duties. So, there is a direct actual impact on their abilities. That is the basis for our Motion To, Quash.

THE COURT: Thank you. They are available, just not here.

MR. CUNNINGHAM: In response to the last part. First, as I told Mr. McElhaney. yesterday when I arrived here shortly before 9:00 o'clock, the attorneys were under the impression that the Court would be here. The Court was not here. That is why, after I [5] talked with the Court I advised Mr. McElhaney that the Court would not be here, and that as soon as we found out what time the Court wanted to reset this matter I would notify him; which I did. I also extended to him and his clients the privilege of not being here this morning at 9:00 o'clock, but I asked him to have them on stand by. I hope that Mr. McElhaney is not arguing that reporters for newspapers are not subject to subpoenaes, because I think that he, as well as this Court, is perfectly aware that reporters, just because they are reporters, are not exempt from being subpoenaed as witnesses in a case. If this was a DWI case, his argument may have some validity, but the State has actively told this man that they are going to seek the death penalty. So, this is the most extreme form of punishment that can be assessed on any individual under our Penal Code and under

our system. As the Court well remembers, during the selection process of the twelve jurors there were constant objections and constant statements by the Counsel for Mr. Miller-E1 with respect and to the manner in which the [6] State was exercising some of its peremptory challenges. And it was stated at that time that it was the position of the defendant that the ten peremptory challenges that were used to strike black members of the prospective jury, in the opinion of the Defense, were done to strike them simply because of their race, in that all ten had qualified. And I think the records will reflect that ten of their fourteen strikes were used to strike black males and females who had been qualified under our system by talking with either one of—well, one side, one of each of the lawyers an the Court. I would also advise the Court that the process does not end just with us subpoenaing Mr. McGonigle and Ed Timms about the article that they wrote on Sunday, or the one they wrote on Monday, or the one they wrote on Tuesday. That is just the first step, along with other procedures, and other subpoenaes that have been issued, and other matters that will be offered into evidence on behalf of Mr. Miller-E1 to show the Court that, and request of the Court, that the twelve jurors that have been selected be [7] excused, and that he be allowed to proceed with the selection of another jury panel free from the taint that the present twelve has. Therefore, we submit that because of the seriousness of the charge that Mr. Miller-E1 stands indicted for, and jurors have been actively told that they're going to seek the death penalty, and that it is their intention. Also, I think our motion goes to the practice of whether or not there is a policy of the Dallas County District Attorney's office to exclude minorities and/or blacks from sitting on, not only felony juries, but in Mr. Miller-Els case a capital murder jury, the most serious of offenses. We submit that the articles by the Dallas Morning News, along with what we have already contended and with other material we propose offering, will all go to support our contention; at

which time we will again move to strike this jury and let us proceed in choosing another one.

THE COURT: Okay, Mr. Cunningham. Mr. McElhaney, do you want to—

MR. CUNNINGHAM: We are not concerned with McGonigle and Timm's source, we are more [8] concerned with the article they wrote, that they wrote it, and the material that they used. And we are not concerned about their source, if they think we want to know whether John Jone's or Mary Smith told them this, we're not concerned with that.

THE COURT: The material, according to what Mr. McElhaney said, doesn't it mostly come from public records? I haven't read all .the article, I read some of it.

MR. CUNNINGHAM: There are various individuals, Your Honor. My understanding is that they examined four thousand four hundred thirty-four prospective jurors. And out of that number, they made a determination that ninety-two percent of the blacks were excused, roughly four hundred and five. They also indicate that they examined one hundred trials randomly.

THE COURT: All right. I am going to do this, Mr. Cunningham—I hope it is not a disservice to anyone—because of the number of people that have many other things to do besides being here, I am going to, Mr. McElhaney, take the Dallas Morning News' [9] motion under advisement. If you will bear with me on this, at least until I hear all the' testimony relating to this particular motion. Mr. Cunningham, I will let you—I notice you, have other people under subpoena. I have had several contact me about schedules. I would like to have benefit of their testimony, if any, and give me a chance to look at law on the first amendment question.

MR. CUNNINGHAM: The first step to proceed with was with the news reporters, then to Judge Sparling, then to some other witnesses.

THE COURT: At this point in time, I guess I will not grant the Morning News' request, but I will not rule on it until I have a chance to maybe hear some other witnesses and the chance to look at some of these cases and decide the motion.

MR. CUNNINGHAM: Whether the Court denies the motion or not, we'll still want McGonigle and Timms here to make a record, a Bill of Exception, to what we would have offered through these two witnesses but for the fact of the Court denying the motion.

[10] THE COURT: I want you to be able to make a Bill on it, a full Bill if necessary.

MR. CUNNINGHAM: To be able to make a Bill we are going to need them.

THE COURT: Whether or not you do it through live testimony or some other method, we can deal with—as I read your subpoena, essentially what you are concerned with is getting the articles themselves.

MR. CUNNINGHAM: The articles themselves should have a list of the cases, and four thousand names. Once we get that, we can move on from them.

THE COURT: Might get some of their source material, but they said that it is a matter of public record. Let me take this matter under advisement, unless you wish to stay. I will not permit your clients to be interviewed or questioned without your presence in Court.

MR. WEST: There is also another subpoena out for another news reporter for the Dallas Morning News, Melinda Hemper.

THE COURT: I am not aware of that subpoena, or Motion To Quash in her behalf.

[11] MR. MC ELHANEY: Your Honor, Mr. West just told me that just now, I wasn't aware of it either. I will contact her. We would like to amend our motion to include her. I understand from Mr. West it is the same grounds, same proffered reason for wanting her.

THE COURT: I don't have any problem, I want to save as much time as possible for both parties, to include any Dallas News reporter that participated in this particular motion. What I am saying, Mr. McElhaney, is I have not decided. Obviously, I just want a chance to hear what the motion is about. Let me look at some law and look at Bransburg, some of those cases. So, you are excused. You are welcome to stay if you want, but before I do anything I will contact you and let you know.

MR. MC ELHANEY: Thank you., Just one matter; the Supreme Court cases in the cases in this area tend to be very lengthy. I know the Court has severe time constraints. To sum it up, I would say the xerox copy of the case opinion attached to our brief although a civil case, nevertheless, cites the rules that we [12] believe are also applicable here. And so, just for the Court's convenience, this opinion that is attached to the brief I think is -would give the Court the outline of our argument.

THE COURT: I appreciate the help. Mr. Cunningham, are you going to say something else?

MR. CUNNINGHAM: Since the Court was taking it under advisement I wanted to know whether or not Mr. McElhaney and his clients were going to be under the gag rule also?

THE COURT: The gag rule ran to the parties, I am not going to prevent the press from airing stories about this hearing. Does that answer your question? I was concerned-the

gag order was more directed at the lawyers in the case at the time than the newspapers. I am not going to do that.

MR. CUNNINGHAM: Wouldn't you consider they are now parties, having filed a motion? And they are seeking to quash their having to testify in this case and possibly any evidence being offered through them.

THE COURT: I won't extend it to them.

[13] MR. CUNNINGHAM: Well, to that extent then, we would then invoke the Rule.

THE COURT: I am going to deny that.

MR. CUNNINGHAM: The Court denied that?

THE COURT: As regards to newspaper people.

MR. CUNNINGHAM: Not newspaper people, just anybody from the Dallas Morning News: Timms, McGonigle.

THE COURT: Anyone that's been subpoenaed, I will honor the Rule on that.

MR. WEST: Your Honor, the tenor of our request to invoke the Rule is that potential witnesses not be allowed to discuss this matter with anyone else, as the Rule has been invoked in other criminal cases, same thing.

THE COURT: Now, I am ready to take up the next motion. Motion To Dismiss or To Quash the Indictment and/or Select A Separate Jury. Is that a fair summation of that? Who would you like to call on that?

MR. KINNE: Your Honor, the Court -before the Defense is allowed to call any witnesses, may I be heard with regards to this particular motion?

[14] THE COURT: Surely.

MR. KINNE: The Motion To Dismiss The Indictment, I submit that it is untimely filed pursuant to article 28.01 of the

Texas Code of Criminal Procedure; number one. Number two; as I understand the motion, it prays that the Court order the selection of two juries in this case; which remedy the Court could not grant if he wanted to. And a Motion To Quash The Indictment because article 37.01 of the Texas Code of Criminal Procedure is unconstitutional. We feel that that section of the motion does not require testimony. The Court can determine at this point in time, as has previously been determined by higher Courts, that the particular article of the Code of Criminal Procedure is constitutional. Since the Court could not grant the relief prayed for by the Defense, I feel that hearing testimony on a motion which the Court could in no way grant is a waste of everybody's time; hearing things that the Court couldn't do if the Court wanted to. And, therefore, we would urge the Court to deny this particular motion.

THE COURT: Actually, I have two [15] motions on it, Mr. Cunningham.

MR. CUNNINGHAM: There are two motions.

MR. KINNE: I thought the Court was addressing that motion.

THE COURT: I have got one to dismiss the indictment and one to quash the indictment. Are they the same motion?

MR. CUNNINGHAM: Separate motions.

MR. KINNE: I thought the Court said we are going to take up the Motion To Quash The Indictment and Be Allowed To Select a Separate Jury.

THE COURT: Tell me what you want.

MR. KINNE: With regard to the Motion To Quash The Indictment For Systematic Exclusion Of Classes From The General Venire, again Your Honor, this motion is most certainly untimely filed pursuant to article 28.01 of the Code of Criminal Procedure. And again, the Court has previously

ruled on the Defense's motion with regards to the selection of the jury, with regards to quashing this particular jury. The remedy prayed for by the Defense is that the Court quash the indictment should the Court find that classes of people [16] have been excluded from the jury; which again, the Court would have no authority or jurisdiction to quash an indictment returned by a Grand Jury based upon those grounds even it the Court should find there was any truth to it whatsoever, And we feel, again, that we are wasting time on a useless matter that the Court couldn't grant if he wanted to. And if they have objections to the composition of the jury, certainly, they can make motions subsequent to trial and protect the record in that manner. We summit that the Court could not grant the motion, and hat it is made for a delay of time and for possible political motivations. We would urge the Court to deny both motions at this time.

THE COURT: Mr. Cunningham, do you want to reply?

MR. CUNNINGHAM: Your Honor, I am getting tired of hearing about political motivations.

MR. KINNE: I don't care what you are getting tired of.

MR. CUNNINGHAM: I did not interrupt Mr. Kinne when he was making his speech of gobbledy [17] gook and nothing.

MR. KINNE: Object to Mr. Cunningham's interpretation of gobbledygook and nothing. I didn't insult him.

MR. CUNNINGHAM: Mr. Kinne knows I am not running for office, my concern is Thomas Joe Miller-El, the man to my immediate left, that the State has said they are actively seeking the death penalty on. Anything within the rules of criminal procedure or the penal code that I can do to protect Mr. Miller-El's rights, I am going to do whether Mr. Kinne likes it or not.

MR. KINNE: Excuse me, Your Honor, I would like to object to Mr. Cunningham's statement. If he wants to respond

to me that's fine, but if he wants to quarrel with me I have to object to it at this point in time.

MR. CUNNINGHAM: I am addressing myself to the Motion To Quash The Indictment Based on the Systematic Exclusion Of Classes From General Venire. The prayer prays that the jury be quashed and that a new jury be selected to try the case, free of violations [18] of the sixth amendment right. He prays for such other, further relief, on the premises that this Court may deem proper. There is nothing in the prayer about quashing the indictment.

THE COURT: All right. I took that maybe—that was my question, Mr. Cunningham. I asked this question because assuming that, you know, if you can prove the allegations to the motion I don't think the Court has any more power under that theory of law to quash the indictment because, maybe the jury, but not the indictment. Is that what you are saying?

MR. CUNNINGHAM: I am attacking the jury, the twelve that have been seated, that we say are tainted by the use of the State having used its peremptory strikes in a discriminatory manner by striking ten blacks that were qualified, ten of their fourteen strikes being for blacks. That's what we are concerned with that the Court can still address itself to.

THE COURT: Go ahead.

MR. CUNNINGHAM: Because if the Court [19] finds, after a hearing based upon the evidence, that if that occurred then the Court has the power to say that this jury selected has been tainted, therefore, I am going to dismiss this jury and start picking a new one. That's what we are asking for.

THE COURT: Okay, I am with you.

MR. CUNNINGHAM: That's what we want offer evidence on.

THE COURT: Mr. Kinne, I think you may have answered that, so we narrow—I think the only issue I really have in

front of me is whether or not they would be entitled to have an evidentiary hearing on the Motion To Quash The Jury that's been selected and sworn individually, at least at this point in time, on the basis of some sort of racial exclusion, or however you want to characterize it. I don't have any authority to grant a Motion To Quash The Indictment at this point in time. We had extensive pre-trial before the trial started on both motions, so—or motions I should say. But on this one, Mr. Kinne, is—what is your position about the Defense being allowed to bring a defense, if it has any, to [20] show that the State has some sort—

MR. CUNNINGHAM: While he is looking at it; the Court when we had the other pre-trial also told counsel for Mr. Miller-El that we would have the opportunity to file any other motions and you would rule on it.

THE COURT: I think the time to quash the indictment, though, I think that was a misheading; I will treat it like that. I am not going to quash the indictment based on impropriety in the jury selection, if there was any. Mr. Kinne, on the question they raised about alleging the State in some form or fashion was discriminatory in jury selection, I don't see any—How do you answer that?

MR. KINNE: I'm sorry, I was thrown off by Mr. Cunningham's motion, which is entitled Motion To Quash Indictment, but prays for some other relief with regards—I believe the Court has already ruled on the composition of the jury. And, again, the witnesses that have been subpoenaed by the Defense, as far as I know, had nothing to do with the selection of this jury for the State of Texas or for the [21] Defense. I fail to see how Judges sitting in other courts and some former Assistant District Attorneys who were in the District Attorney's office many years ago—And, again, none of these people have had anything to do with the selection of the jury in this case, since the people who had anything to do with the selection of the jury have been here before the Court

for the last five weeks; that being the Defense Counsel, Mr. Nelson, Mr. Macaques and myself. None of the witnesses they have subpoenaed had anything whatsoever to do with the selection of the jury. And we submit that, again, this testimony with regards to what may have happened somewhere else in some other case has nothing to do with the selection of the jury in this case. And we would further urge the Court that this is merely for delay. That the State has at great expense brought witnesses in, from not only out of town but out of state, in anticipation that we would be proceeding to trial in this matter. And we feel that the Court has already ruled on the composition of the jury, and we would urge the Court to deny the motion [22] and proceed to trial.

THE COURT: Mr. Cunningham, I am prepared to rule on your motion, but I think I can note something if the lawyers disagree on something. Of course, both sides agreed to excuse certain jurors in voir dire because of the way we agreed to conduct voir dire. Some excused by agreement were blacks, some others were not. Of course, I think the record will show on voir dire, which has been conducted in five weeks as individual jurors were challenged or struck, that the Court—it wasn't necessarily the Court, I guess the lawyers themselves usually made a record of the race of the juror. And the State, as I recall, on every single strike where it was challenged by the Defense they stated to the satisfaction of the Court at least, that the reason for striking a particular juror was not racially motivated. That is already in the record. What you are proposing to do is go beyond that?

MR. CUNNINGHAM: Yes, sir.

THE COURT: To show what?

MR. CUNNINGHAM: One; to show there was [23] a practice and procedure in the District Attorney's office dealing with the striking of minorities, and particularly blacks. That there was printed material, and that that material

exists and has existed for a long period of time, possibly up even till now. And that the strikes that were used in this case were a carrying out and a continuation of the policy that was set out in that guideline or instruction to fellow—well, to prosecutors on how to select jurors and who t keep off juries.

THE COURT: Mr. Kinne, I am going to let the Defense try to support its motion. I can't pre-rule on it, but I want the record—maybe I am wrong, but I want the record as clean as possible. If it goes up, I don't want some Court back down the line to conduct a hearing post-trial, I had rather have the record be complete. So, if there is a viable issue here to be judged properly on appeal, Mr. Cunningham; I don't want to make this, as you might well suspect, a long matter because I just happen to know some of the people that have been subpoenaed are trial Judges in this [24] courthouse and other people. They all have busy schedules, but I am going to stop talking and ask you to call your witnesses.

MR. CUNNINGHAM: Call Judge John Sparling.

THE COURT: We'll limit this to issues in the motion. I don't want you to get off track.

MR. CUNNINGHAM: May we approach the Bench, Your Honor?

(The following proceedings were held at the side of the Bench.)

MR. CUNNINGHAM: You said you didn't want us to get off track, I don't know what .you mean by getting off track. My motion is—my concern is Miller-El's rights and to have a fair and impartial trial.

THE COURT: That's all I am concerned with.

MR. CUNNINGHAM: If any of his Constitutional Rights are involved I am going to do everything I can to protect them. The Court said "get off track," I don't know what [25] you are talking about, I need to know.

THE COURT: Stay within the outline of the motion, what this witness may or may not know in support of the motion. Do we have more witnesses?

MR. WEST: Before we go back outside, I think for record purposes; if for any particular reason that any party in this case thinks this is politically motivated, I will withdraw as attorney in this particular case.

THE COURT: The Court doesn't think that.

MR. CUNNINGHAM: It is being said.

THE COURT: Well, I hope not.

MR. KINNE: And I will say it again.

THE COURT: On the record. Go ahead, Mr. Cunningham.

(The following proceedings were held in open court.)

JOHN SPARLING,

the witness, having been duly cautioned and sworn to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

[26] DIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. State your name.
A. John Sparling.
Q. And what is your occupation or profession?
A. I am an attorney.
Q. And how long have you been practicing?
A. Nineteen years, approximately.
Q. You are a former Court of Appeals Judge?
A. That's correct.
Q And you resigned a month or so ago?
A. About two months ago; that's correct.

Q. Were you ever employed by the Dallas District Attorney's office?

A. I was.

Q. When were you first employed by the Dallas County District Attorney's office?

A. February 1st, 1968.

Q. And would you kind of tell me what positions or jobs you had with the Dallas County District Attorney's office?

A. Well, I was hired as an Assistant District Attorney. I was assigned to Judge Gutherie's misdemeanor [27] court as most trial—most prosecutors assigned to the trial division. I started out as third man in misdemeanor court, and went to second man, and headed up misdemeanor court.

I was promoted to a felony court, and was in two or three different felony courts, and eventually became Chief Prosecutor of a felony court.

I then helped establish what was then called the impact program, which was a—which were monies that were given by the Federal Government to the City of Dallas, and in turn were given to the County of Dallas in order to create sort of visiting courtrooms to combat crime on the streets. Subsequent to that, or during that period of time, I moved from one court to another trying a variety of different cases.

In 1973, I helped write a grant called the Specialized Crime Division and started a unit called. the. Specialized Crime Division. And I remained head of that division until September 1981, at which time I left the Dallas County District Attorney's office.

Q. While with the Dallas County District Attorney's office, did you have an occasion to write an article entitled Jury Selection In A Criminal Case?

A. I am not entirely sure that I put that title on it, but that's how it is known today. Yes, I wrote it.

[28] Q. Do you remember what title you put on it when you wrote it, if any?

A. I believe it was untitled.

Q. Would you tell me who asked—well, first of all, did someone ask you to write the article?

A. Yes.

Q. Would you tell me who asked you to write the article?

A. I wish I could remember. I know it was not Henry Wade, and I don't recall who it was, but I know that it was someone higher in the District Attorney's office than was I.

Q. In other words, someone higher than you, but less than Mr. Wade himself?

A. I would have remembered it if it had been Wade, and it wasn't.

Q. As a result of one—well, strike that. Would the person that asked you to write this article have been your superior?

A. Sure.

Q. As a result of one of your superiors asking you to write the article, you did so; is that correct?

A. I did.

Q. Okay. Did the person that asked you to write the article give you any ideas of what he wanted in the [29] article pertaining to jury selection?

A. No. You call it an article, and I might to—

Q. What would you call it?

A. Well, it began as a handout. That was back—way back then there were Saturday morning sessions where some of the felony prosecutors would lecture some of the misdemeanor prosecutors. And I was asked to speak on jury selection, and I was told about a week prior to the time that I was to give my talk that I had to have a handout. So, I think one Sunday afternoon, or one afternoon, I recall, at home I sat down and wrote out the document that you probably are holding in your hand today.

Q. Now, this handout as you called it, who was it distributed to?

A. It was at that time given to misdemeanor prosecutors in the Dallas County District Attorney's office .

Q Can you till me when you first prepared this handout?

A. It was in 1969.

Q. Okay. And was it was a handout that was subsequently given to felony prosecutors?

A. I can—Whether it was given to felony prosecutors I don't know. Let me say this; that I had no [30] great pride of authorship, I did it because I had to. I didn't want to do it at the time simply because it meant more trouble. I was not paid to do it, and I did not do it on the District Attorney's time. I pretty much lost track of it until it became an item.

Q Did the hand out of handbook that you wrote become a subsequent part of a larger manual?

A Yes.

Q So, that the handout that you wrote, not on the District Attorney's time but was given at out at least to misdemeanor prosecutors, was subsequently included as a part of a larger manual for persons employed by the Dallas County District Attorney's office?

A. I didn't—As a matter of fact, it was included in a statewide manual for criminal defense lawyers with a notation that it added something to jurisprudence.

MR. CUNNINGHAM: May I approach the witness, Your Honor?

THE COURT: Surely.

(An item was marked as Defendant's Exhibit No. 1 for the purposes of identification.)

Q. Judge Sparling, I show you what's been marked [31] as Defendant's Exhibit No. 1. And I'll ask you whether or not—well, have you had an opportunity to look at that?

A. Well, let me—I have had a chance to—Let t this way: I have not looked at it to make sure each page was stapled in sequence, it starts at page 301 and ends on page 318; it appears to be.

Q. The handout that you prepared that is now a part of a much larger manual?

A I don't know what it is today.

Q. All you know, probably—

A. I do not—I do not think it is part of anything that is currently circulated to anybody today.

MR. CUNNINGHAM: Offer Defendant's Exhibit 1.

MR. KINNE: We'll object that Judge Sparling's article written in 1969 is hardly relevant on material on a jury selection here in March of 1986.

THE COURT: I am going to overrule, not that particular objection. I am going to let it remain part of this record and I am going to determine its relevancy, if any.

Q. (By Mr. Cunningham) Judge Sparling, would you tell me whether or not there are any remarks contained in [32] your article that you wrote, that was handed out as a handbook to prosecutors, with respect to how they should handle prospective minority jurors?

A. Yes, I said—Now, your question is slight multifarious. Understand, I did not hand this out; I didn't include this in this manual; nor did I cause its publication. I wrote it one Sunday afternoon and handed it to about fifteen misdemeanor prosecutors.

Q. The manual you wrote one Sunday afternoon in 1969, did it shed any light or give information to prospective prosecutors of what action, if any, they should take with respect to minority jurors; specifically black jurors?

A. I don't see—I am not sure that I ever used the word black, and I am not sure I ever picked out blacks in. this thing.

Q. Did you use the word minority?

A. I did use the word minority. I understand you have one man on your jury which would be a minority, wouldn't it?

Q. Maybe. Which one?

A. I'm sorry, what?

Q. Which one?

A. (No response indicated.)

Q. Would you tell the Court what your thinking [33] was in 1969 when you wrote the article and passed out the handout with respect to minorities serving on juries?

MR. KINNE: Again, we'll object to what this witness' opinion was in 1969 as being irrelevant and immaterial to this hearing.

MR. CUNNINGHAM: I think I will connect it up, Your Honor.

THE COURT: Go ahead.

A. All I can do is read what I wrote as to what to look for. "You are not looking for any member of a minority group which may subject him to oppression." I meant oppression by the State. "They almost always empathize with the accused." In that same vein, somewhere over here I said—remember, this is 1969.

Q. Uh-huh.

A. I say someplace else in there that minorities tend to empathize with the accused, probably say it twice.

Q. Now, you left the Dallas County District. Attorney's office in what year?

A. In 1981.

Q. Okay. Do you know whether or not there were any updates or any changes in that particular jury selection handout from '69 when you wrote it up until '81?

A. No, I don't.

[34] Q. Okay. And you are not saying that there were not any changes or updates, or whether or not they left it as you wrote it?

A. I don't know. All I know is that it was placed in a manual, and at my request I believe it was taken out.

Q. When you left in 1981, were any of those manuals still in the D.A.'s office and still being used, either by misdemeanor or felony prosecutors?

A. I can't answer that, I don't know.

Q. Is it your belief that the handout that you wrote in 1969, that the reasoning behind that handout has not changed?

A. Well, I think the handout is terribly out of date.

Q. That's not—it may be termed out of date, but are you saying that the underlying reasoning with respect to the selection of juries has not changed from what you wrote in 1969?

A. The reasoning? In what respect, can you be more specific? The underlying reasoning is you don't want to take anybody on a jury, if you are a prosecutor, unless you have—unless you believe that he will convict. That's the underlying reasoning of the entire paper. That has not changed since 1969.

[35] Q. Would a further extension of that be that minorities, because they—you believe they empathize with' the defendant, would not convict?

A. No, and I never said that they would not; I said they often empathize with the accused.

Q. Okay.

A. And I am not going to let you back me into any kind of situation that it says or implies systematic exclusion of any group of people was advocated.

Q Well, what I am concerned with now is whether or not you have said that the paper's underlying reasoning hasn't changed from when you wrote it in '69 to right now, as of February 28, 1986?

A. Is that a question?

Q. Yes, sir.

A. The underlying reasoning of the article on jury selection was to try to select; or actually more accurately, to

try to eliminate those persons from your jury that you do not believe will convict, using peremptory challenges.

Q. When you make the statement that you are not looking for a member of a minority group which may subject him to oppression; what type of oppression are you talking about?

A. Well, my attitude was that, in 1969, that [36] there were certain, either groups of people that may either actually be, or perceive themselves as being oppressed by the state, being discriminated against. The thought being:', If they were, in fact, discriminated against, and if they had, in fact, been oppressed by the state, normally they might take it out against the State. In 1969 things—our world has changed drastically since 1969. I don't need to tell you that. But there was a lot going on in 1969 that is not going on in 1981 or 1986.

Q So, you are saying that if a minority felt that he had been oppressed by the system, then he was not—or you should not look for that type of person on the jury.

A Let's say that if a white Anglo-Saxon male felt he had been oppressed by the system, you wouldn't' want him either.

Q But I don't see where you said that you are not looking for any member of a white Anglo-Saxon male who had been oppressed, you said minority.

A That's right and—is that a question?

Q Yes, sir.

A Yes, I did say minority. I mean, you are reading it. I am delighted to have you read it if you want.

Q I am still trying to find out what you mean [37] when you say "subject him in oppression". Who 's going to oppress him—

A If you don't understand it, a great lawyer like you, I am not sure anybody else could have understood it either. That would make it pretty meaningless.

Q I don't think it would be pretty meaningless. Probably somebody could interpret it any way they wanted, like in the District Attorney's office.

MR. KINNE: Excuse me, Your Honor, is that a question?

MR. CUNNINGHAM: It is a comment.

MR. KINNE: Could we have a question and not just a conversation between Mr. Cunningham and Mr. Sparling?

THE COURT: Let's move on. Anything else, Mr. Cu ningham?

MR. CUNNINGHAM: Just a minute, Your Honor.

Q. (By Mr. Cunningham) Judge Sparling, you are aware that the Civil Rights Act of—well, the Civil Rights Act was passed in 1964?

A. Which one?

Q. The first one.

A. There's a Civil Rights Act of 1983. There are, oh, a whole bunch of them.

Q. The Civil Rights Act of 1964.

A. I can't agree with you that was the first one, Mr. Cunningham.

Q. Was there a Civil Rights Act passed in 1964?

A. I don't know.

Q. When, you wrote your article five years later and you referred to the word "minority group," what minority groups were you speaking of?

A. I don't recall.

Q. You had no particular minority group in mind?

A. I think any group that felt that they had been as a group oppressed against. And don't ask me to, seventeen years later, to try to interpret it.

Q. Were you talking about Negroes? Were you talking about Mexican-Americans in '69? I don't think we had any Vietnamese here. All that—were you primarily talking about

Negroes and Mexican-Americans in 1969 when you referred to minorities?

A. No, I don't think I was, primarily

Q. When you talk about race, were you referring to Negroes or Mexican-Americans?

A. I am not sure that's what was in my mind. I understand, you know—

Q. Well, let me read it. It says race, "Minority races almost always empathize with the defendant." Were [39] you talking about Negroes, Mexican-Americans?

A. Possibly, yes.

Q. Were there any Negroes in the District Attorney's office in 1969 when you wrote the article?

A. I don't even remember.

Q. What about Mexican-Americans?

A Yes.

Q. Do you remember what his name was?

A. I think Sef Dominques was a prosecutor then.

Q. Do you know the names of any white prosecutors who were in the District Attorney's office, at the time that you wrote the article, that are still there? Was Norman Kinne there?

A. No, I don't think so,

Q. What about Paul Macaluso?

A. No. I'm sorry, I am not sure when they came to the District Attorney's office. I know that I- was there before they were.

Q. Did either Paul Macaluso or Norm Kinne ever serve under your supervision?

A. No.

MR. CUNNINGHAM: Pass the juror. I mean, pass the witness.

THE COURT: Mr. Kinne, any questions?

MR. KINNE: Yes, sir.

[40] CROSS EXAMINATION

BY MR. KINNE:

Q. Mr.—excuse me. judge Sparling, in 19—let's see, you came to work for the D.A.'s office in February of 1968. In 1969, when this article was written, do you recall what your position was in the D.A.'s office at that time?

A. I do not recall exactly, I was not one of the heavyweights.

Q. I presume—were you in felony court?

A. Yes, I was.

Q. All right. And this paper was primarily written for misdemeanor prosecutors?

A. Yes, sir.

Q. Misdemeanor prosecutors don't try death penalty offenses, do they?

A. No.

Q. Didn't in 1969?

A. No, that was not directed to anything, it was not directed to any capital-type offense.

Q. This paper that Mr. Cunningham has put into evidence then, the quotations that he has asked you about, were never intended to apply to jury selection in a capital [41] offense; is that correct?

A. No. That's correct.

Q. In 1969, or from the time that you went to work with the District Attorney's office from 1968 to 1981, was there ever a systematic exclusion of individuals because they belonged to a particular race, religion or minority?

A. No.

Q. Did you ever teach that, or did you ever hear anybody in the D.A.'s office teaching that?

A. No.

Q. You indicated that things have changed since 1969, and I believe you have partially explained that; is there anything else that you would like to say about that?

A. Well, just simply that, just to point out the fact that times do. change, people change and ideas change. And what was the—what I may have believed too be the contemporary wisdom of the day is not necessarily the contemporary wisdom of today. And I would be delighted if everybody would put that paper in the context of 1969, which is the time it was written.

Q. Just a couple of final questions. Judge, let me ask you: Did you have anything whatsoever to do with the selection of the jury in this particular case?

A. Not a thing.

[42] MR. KINNE: I believe that's all.

REDIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. Judge Sparling, you indicated that this was written for misdemeanor prosecutors.

A. Yes.

Q. And after you had written it and you had give it out to the misdemeanor prosecutors, I believe you said that it was subsequently incorporated in a manual for prosecutors?

A. Uh-huh, that's correct.

Q. Was the manual limited to misdemeanor prosecutors only? Yes or no, sir.

A. There. may be a third answer, which is I don't know.

Q. Okay. Are you saying you don't know?

A. Yeah, that's what I am saying. I had absolutely nothing to do with the placing of that article in a manual. Nobody asked me about it, nobody asked my. approval of it, it was done. And I don't blame the person that did it, it was just done.

Q. Let me see if this is correct: You were directed by one of your superiors to write the article?

[43] A. As a handout; that's correct.

Q. As a handout it was handed out initially to misdemeanor prosecutors?

A. That's correct.

Q. And after that someone thought that the article was well written enough, or contained the thoughts of the office, or at least the superiors who asked you to write it, that it was incorporated in a manual?

MR. KINNE: We'll object to what someone else may have thought, Your Honor.

THE COURT: I will sustain the objection to that particular question, Mr. Cunningham.

Q. (By Mr. Cunningham) As a result of your having written the article it was incorporated in a manual by someone else; is that correct, sir?

A. That's correct.

Q. And as it is incorporated in the manual it is referred to as "Jury Selection In A Criminal Case"; is that correct, sir, as it is entitled here starting on page 301?

A. That's your exhibit, if it is in evidence.. If that's what it says, that's what it says.

Q. Okay, sir. You also told Mr. Kinne there has been no systematic exclusion of either classes or minorities from juries in Dallas County?

[44] A. That's correct.

Q. And you base that upon what, sir?

A. On my thirteen, almost thirteen years experience in the District Attorney's office, knowing other District Attorneys and watching them pick juries, hearing them talk.

Q Let me see, you say you spent thirteen years in the District Attorneys office; how many capital murder cases did you try?

A. Thirteen, eleven, somewhere in there; eleven, thirteen

Q. Out of those eleven or thirteen capital murder cases that you tried, how many blacks was on either one, or two, or all eleven or thirteen?

A. I just don't have any idea, but I would be surprised if there were not blacks on all of them.

Q. Do you know the names of any of*them? Can you give us the names of any of the cases?

A. I can give you the names of some of the defendants. Let me ask you—do you want the names of some of the jurors, the black jurors?

Q. No, the defendants, I want the names of defendants because then I can go to the files and I can find out whether or not there were black jurors on those juries.

A. Well, I have—I mean, I have somewhere the files on the cases that I am in reference to, but I don't have all the names in my head. But I am not sure, really, what you are driving at.

Q. Well, you have made the statement that there has been no systematic exclusion of minorities from juries, and particularly capital murder juries. I think you said that on all of yours there were one or more blacks and I want to see it.

A. I think I said I would be surprised if there were not one or more blacks on all of them.

Q. In other words, one?

A. Brice, I do not remember some of the names. Some—if some of the people I tried for death and got it walked through that door right now, I am not sure I would recognize them. And you are asking me to go back eighteen 'years, or seventeen years, and try to tell you how many blacks were on the jury, what the makeup was. It wasn't that big a deal. If there was a black on the jury, I wasn't—it was not a remarkable event, therefore, I don't remember it.

Q. Do you know Stauffer?

A Sure.

Q. Was he an Assistant District Attorney in the District Attorney's office while you were there?

46] A. Yes.

Q. Did he come after you, or before you?

A. Before.

Q. And was he still in the District Attorney's office when you left?

A. No.

Q. Okay. Prior to the—you said John came before you or after you?

A. He came before I did.

Q. Have you—do you know whether or not Stauffer was the first felony prosecutor that put a black on a capital murder case?

A. No, I don't.

Q. I believe you said the reason that you know there is no systematic exclusion is; one, you didn't do it. Is that what you are saying?

A. Absolutely.

Q. And then other prosecutors told you that they did not?

A. Well, yes, other prosecutors have told me that; that's correct.

Q. Are there any other means by which you can say that there were no exclusions of minorities from participating in felony juries, and particularly capital murder juries, other than your experience and what other [47] prosecutors told you?

A. In other words, can I testify to something other. than what I have seen and what I know? I cannot.

Q. Were you ever—well, did any prosecutor ever indicate to you that he did not want blacks on felony juries or capital murder juries?

A. No.

MR. CUNNINGHAM: That's all, Your Honor.

THE COURT: Mr. Kinne, anything else?

MR. KINNE: Yes, sir.

RECROSS EXAMINATION

BY MR. KINNE:

Q. Just for the record, Judge Sparling, you are presently a Republican candidate for District Attorney; is that correct?

A. Very much so.

Q. One of the Defense Attorneys over here, Mr.. West, Royce West, is a Democratic candidate for District Attorney; is that correct?

A. As I understand it very much so.

MR. WEST: Your Honor, as I have told [48] the Court, Mr. Kinne and the whole world: If Mr. Kinne or anyone else thinks this is politically motivated, I will withdraw from this particular case. The paramount—I am sitting in as a second to Mr. Cunningham—is the Constitutional rights of Thomas Joe Miller-El.

THE COURT: Anything else?

MR. WEST: Judge, do you want to rule on my Motion To Withdraw?

THE COURT: Oh, that is a motion?

MR. WEST: That's the motion. If the Court or anyone else thinks this is a political grandstand as opposed to safeguarding this man's rights, then I will withdraw from this. particular case. I will now tender—

THE COURT: No one asked that you withdraw from the case, I am not going to ask you to. If that's a motion on your behalf, I deny it. The Court always presumes the lawyers do whatever they do for the benefit of their respective sides, excluding exercising peremptory challenges. By the way, is there anything else?

[49] MR. KINNE: No further questions.

THE COURT: Mr. Cunningham, is the witness excused?

(A document was marked as Defendant's Exhibit No. 2 for the purposes of identification.)

FURTHER REDIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. Judge Sparling, I show you what's been marked as Defendant's Exhibit No. 2, and direct your attention to what purports to be a quote with respect to Defendant's Exhibit No. 1. I will ask you whether or not that quote was made by you?

A. Yeah, I anticipated this probably less than 5 minutes ago. The paper's underlying reasoning has not changed. The underlying reasoning is: Do not take a juror that cannot convict.

MR. CUNNINGHAM: I offer Defendant's No. 2.

(A document was marked as Defendant's Exhibit No. 3 for the purposes of [50] identification.)

MR. KINNE: On the basis of one line which Mr.—which the witness has said that he said the underlying reasoning hasn't changed, we'll object to Defendant's Exhibit No. 2, in that it contains a great deal more than that; which is hearsay as far as we are concerned.

THE COURT: I will admit that particular part of that article.

Q. Defendant's Exhibit No. 3, I think which contains your picture and remarks made by you. Well, first of all1, is your picture shown on page 28A of the Dallas Morning News, March 9, 1986.

A. Sure is.

Q. Does it contain remarks made by you pertaining to the jury selection process in Dallas County, and particularly with respect to Defendant's Exhibit No. 2 and—I mean, No. 1?

A. The—it contains statements made by me to a newspaper reporter.

Q. Okay. Those statements were accurately contained in the paper as you told the newspaper reporter; is that correct?

A. Yes. Are you—maybe nobody else knows what we are talking about. But do you and I agree we are talking about the statements underneath the picture?

Q. Yeah, and also let me find your remarks.

MR. KINNE: Excuse me, Your Honor. I believe if he has some statement and he would like to ask the Judge if he made that statement, I think that would be the evidence. If the Judge says that he said it, then says it now, then that's the evidence.

THE COURT: I believe that's correct, Mr. Kinne. Go ahead, Mr. Cunningham.

A. Right. Would you repeat your question again, please?

Q. There are statements contained on 28A which would be, I don't know, about. the fifteenth or twentieth paragraph down, refers to a speech by you, and it goes on for about three or four paragraphs. Is that correct?

A. That's correct.

Q. Was that accurately—were those statements made by you?

A. Yes, they were.

MR. CUNNINGHAM: I offer Defendant's Exhibit No. 3.

[52] THE COURT: Same objection, Mr. Kinne?

MR. KINNE: We'll, yes, sir, he is offering what appears to be a whole newspaper. The Judge has identified a few lines, I take it, of what he said.

THE COURT: Again, I am not sure what purpose it serves, but I will admit that portion of the article which Judge Sparling—

MR. KINNE: He said—but he didn't say it was inconsistent with what he's testified to today. How are we to know what part that is?

MR. CUNNINGHAM: I will point that out for him, Your Honor. Oh, you want to know right this minute?

THE COURT: Get it in the record. MR. KINNE: May I have the witness on voir dire, Your Honor?

THE COURT: Go ahead.

VOIR DIRE EXAMINATION

BY MR. KINNE:

Q Judge, is the part that you and Mr. Cunningham [53] were having a somewhat confidential conversation about; would you mind reading the part that has been attributed to you, that you say that you did say to the newspapers?

A. Yes. It says, Sparling, now a Republican candidate for District Attorney, said his speech merely reiterated, quote, the conventional wisdom of the times. He no longer believes the guidelines are valid." Quote, "I do not see there's a good reason, and I don't think there has ever been a good reason, to exclude blacks," Sparling said last week.

MR. CUNNINGHAM: Judge, I think two paragraphs above that, that you did not read and Mr. Kinne did not ask you to read; would you read those two also?

MR. KINNE: If that's what you said. I don't want him reading some part of the newspapers, I am interested in what in the heck he's offered into evidence. I asked the Judge what part of that newspaper he agrees he said.

CONTINUED REDIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. Would you agree you said the two paragraphs I [54] was just talking to, immediately above the two that you just read?

A. Said to the newspaper reporter?

Q. The speech by then Assistant District Attorney John Sparling.

A. That is contained in your Defense Exhibit there.

Q. Go ahead, because. the next down it is—

A. The only thing I said that is not already in evidence is what I just read.

Q. Well, Mr. Sparling asked you to read two paragraphs.

A. Mr. Kinne.

Q. I'm sorry, Mr. Kinne asked you to read the two bottom paragraphs, I want you to read the two immediately before then, which are concerned with remarks made by you about the issue that we have been talking about.

A. "The speech by then Assistant District Attorney John Sparling noted that minorities, quote, almost always empathize with the accused, therefore, do not make good jurors for the prosecution." Let me back up to—for a minute. I did not say, "Therefore, do not make good jurors for the prosecution." I said, quote, "Almost always empathize with the accused," close quote. That's the extent of what I said.

Q. In other words, you are saying that you did not tell the reporter, "Therefore, do not make good jurors for the prosecution"?

A. I did not tell the reporter that.

Q. The next paragraph.

A. Quote, "You are not looking for a fair juror," that's in quotes, Sparling advised. And there's, quote, "Rather a strong bias sometimes in a hypocritical individual who believes defendants are different from them in kind rather than degree," close quote.

Q. That was your belief as of probably March 7 or March 8, 1986, when you made that statement to the reporter?

A. No, Mr. Cunningham, I think you are confused, 15 they took that out of the jury selection paper that is on 16 your counsel table. that was written in 1969.

Q. Okay.

A. What I said to the reporter was the first thing I said in answer to Mr. Kinne's question; that the conventional wisdom of the time that—that the speech merely reiterated the conventional wisdom of the time, and that I don't see there's any good reason, there's never been any good reason to systematically exclude blacks. That's what I said in 1986.

Q. When did you make this statement?

[56] MR. KINNE: Which statement?

Q. Okay. You are not looking for a fair juror?

A. I said that in 1969.

Q. Anyone reading article would not know that you said that in 1969; is that correct?

A. But I can't be held accountable for that, Mr. Cunningham.

Q. Just being honest -and fair, if someone picked up this paper tomorrow and read that statement they would not know that you are talking about something that you wrote back in 1969? Isn't that true, sir?

A. I couldn't—I can't speak to what a reader of the newspapers is going to assume or not assume. But understand, when we talk about a fair juror, that was not a comment that a fair juror couldn't be had. A fair jury, a fair juror and fair juries come out in the wash, that was the sentence's meaning behind that in 1969.

Q. I get the impression from what you said that you advised that you were looking for a strong, biased, sometimes hypocritical individual who believes that defendants are different from them in kind rather than degree.

A. From the perspective of a prosecutor trying to convict, that's correct.

MR. CUNNINGHAM: That's all, Your [57] Honor.

THE COURT: Anything else, Mr. Kinne?

MR. KINNE: That's all.

THE COURT: Thank you, Judge, you will be excused.

Mr. Cunningham, do you have anybody here right now? I am going to work as long as possible, but my reporter might rest her fingers for a few moments. Do you have somebody to testify right now?

MR. CUNNINGHAM: We asked Judge Hampton to come down.

THE COURT: Is he not outside the room? Mr. Cunningham, who will you have next?

MR. CUNNINGHAM: The Honorable Jack Hampton.

THE COURT: Okay, Judge Hampton.

JACK HAMPTON,

having been sworn as a witness to tell the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

[58] BY MR. CUNNINGHAM:

Q Go ahead, state your name.

A Jack Hampton.

Q And are you employed, sir?

A Yes, sir.

Q Where are you employed?

A Judge of the 283rd District Court.

Q. How long have you been employed as the Judge of the 283rd Judicial District Court of-Dallas County, Texas?

A. Since June 1st 1981.

Q. Prior to June 1st 1981, were you engaged in private practice?

A. I was, yeah.

Q How long were you engaged in private practice?

A. Nineteen years.

Q. Before going out in private practice were you employed by anyone else?

A. I was employed by Henry Wade, District Attorney, for five years.

Q. And can you briefly recall what jobs you held; i.e., whether or not—I assume you started in misdemeanor court?

A. Yes, I did.

59] Q. Okay. Did you work your way up from the misdemeanor court?

A. I did, uh-huh.

Q. What was the highest, I guess, rank that you attained while in the District Attorney's office? Did you make felony prosecutor?

A. I was a felony prosecutor in the Criminal District Courts for two years, 19—last of 1960 through the first half of 162. And I guess—well, now it would be called the number two position is what I had.

Q. I will ask you whether or, not, while you were serving as a felony prosecutor, you were ever reprimanded by the District Attorney of Dallas County, Texas because you had allowed a black woman to serve as a juror.

A. I was not a felony prosecutor at that time I was misdemeanor.

Q. Misdemeanor?

A. A misdemeanor prosecutor.

Q. That's even—well, were you ever reprimanded] by the District Attorney of Dallas County, Texas for allowing a black woman to serve as a misdemeanor juror on a misdemeanor drunken driving case?

A. Either Mr.—the District Attorney or his first assistant, James K. Allen, at the time.

Q. So, either Mr. Wade or the number one first [60] assistant James K. Allen reprimanded you for having put a black female on a misdemeanor DWI jury?

A. That's true.

Q. Was anything said to you by either Mr. Allen or Mr. Wade about what would happen if you ever put another black on a jury?

A. My recollection is that I would be fired if I did that again.

Q. Did you ever put any—from 1958 through 1962 did you ever put any black, a male or female, on any of your misdemeanor juries or any of your felony juries.

A. Not unless I just ran out of strikes. I could' have run out of strikes, but I am not—I don't recall ever having done it; in answer to your question.

Q. In other words, if there were blacks who were in the number that .the jury would come out of, say the first thirty-two, and there were blacks in that number, you invariably used your peremptory strikes to strike those blacks? Do you follow my question? Let me back up.

A. Okay.

Q. Say that in 1962, before you left the District Attorney's office you were a felony prosecutor, if at that time you were selecting a jury on a felony case and the panel had qualified, and you knew—you then knew that the [61] jury came out of the first thirty-two, your ten strikes plus the Defense's ten strikes.

A. Right.

Q. If there were one or more blacks in the first thirty-two, what do you do as a felony prosecutor for Henry Wade?

A. We usually got them off, used the peremptory challenges.

Q. Do you know whether or not other felony prosecutors—let me back up. Do you know whether or not other misdemeanor prosecutors were doing the same thing that you were doing with respect to getting blacks off of juries when you were in misdemeanor courts?

A. I think we all handled it about the same way, we didn't talk much about it, but from observation that is what happened.

Q. Would the same- be true with respect to getting blacks off of felony juries for the couple of years that you were in felony court?

A. The same would be true.

Q. And when a black did not—was not challenged for cause and that cause was sustained, the only other way that you got that black juror off was to peremptorily challenge him?

A. That's the only way.

[62] Q. Do you know whether or not—well, you were in private practice from 1962 through 1981, I will ask you whether or not you had occasions to try any criminal cases during that period of time, sir?

A. Many, many criminal cases.

Q. And can you give us a rough idea of how many criminal cases, felony criminal cases, you may have tried from 1962 through 1981?

A I just don't know. You know, I tried four or five a year, at least; I guess maybe eighty to a hundred, something like that.

Q. Out of that eighty to a hundred estimation, can you give us an idea of how many black jurors, if any, were actually seated as a part of the jury of the case that you were trying?

A. I just don't have any recollection. about that, if there were. There may have been some, but I just can't recall

Q Would the number have been small.

A It would have been small.

Q Considerably small?

A Probably, yeah.

Now, you have been on the Bench since '81 through the—

MR. CUNNINGHAM: Pass the witness.

[63] THE COURT: Mr. Kinne, any questions, sir?

MR. KINNE: Yes, sir.

CROSS EXAMINATION

BY MR. KINNE:

Q. Judge, with regards to your being reprimanded about putting a black juror on a misdemeanor panel, you don't now recall whether it was Mr. Wade or James K. Allen?

A. No, I am not sure.

Q. Okay. You were quoted, I believe, in the newspapers as saying Mr. Wade reprimanded you.

A. Yeah, that's—that is the way the quote came out. I probably told Mr. McGonigle it was Mr. Wade. And I have thought about it since, and I am just not sure at this point which one it was, it was a long time ago.

Q. Okay. Are you saying—as I recall the story,.. it indicated that this one particular juror hung up the jury; is that right?

A. That's right. I remember the trial very clearly, it was as a young prosecutor. The first two or three cases you remember almost personally, I do remember that, uh-huh.

Q. All right. Was—certainly, James Allen [64] wasn't trying misdemeanor DWI's?

A No, none of them were in the court. They were not in the court.

Q. All right. And you recall specifically that he reprimanded you for putting a person on there who was black, or that you put a person on there who hung up the jury?

A. My recollection is it was because I had put a black on there who had hung the jury.

Q. Now, you said that you, as I understand your testimony, that you think that the other prosecutors handled it that way but that you all didn't talk about it?

A. We didn't discuss it much, there may have been some discussion about it'. But just from observation when I was working with other prosecutors that's the way we handled the jury selection process.

Q. From your observation?

A. From my observation, yeah.

Q. I take it, then, that you're not telling us that even in 1962 it was the policy of the District Attorney's office to exclude people from juries solely because of their race?

A. I can't say that, huh-uh.

Q. All right. When you were a defense attorney for nineteen years, did you make—you tried criminal [65] cases, did you not?

A: Yes, frequently.

Q. And when you selected jurors, as representing the defendant, did you make an effort to put minority people on your jury, as a defense lawyer?

A. I didn't—I mean, I used my peremptory challenges on people I deemed to be State jurors. I assumed the State tried to get the minorities off, that was always—

Q. You would have liked to have had minority representation?

A. Sure, and may have gotten some, I just don't recall any specific cases at this time.

Q. When you walked into a courtroom and you saw the jury panel, is it fair to say that you perked up a bit when you saw numerous minority people on that panel?

A. That's fair to say. That's true.

Q. Because you stood a good possibility of getting these minority people on the jury; is that correct?

A. That's true.

Q. Why would you want them on the jury?

A. Well, I always felt like I had a better chance for acquittal if I had a minority on the panel.

Q. Would you agree with the statement, then, that minorities, certain minorities, tend to empathize with the [66] defendant?

A. I would agree with that sometimes. It is not as true now as it used to be, but at the time that I was trying cases I felt that was true.

Q. Of course, you approached the jurors on an individual basis?

A. True.

Q. Is that correct?

A. That's true.

Q. There are certain occupations, for example, that you as a defense attorney or as a prosecutor, just taking an occupation, that you want to approach with caution because certain occupations have a tendency to either be more State's minded or more defense minded?

A. That's true, uh-huh.

Q. From the Defense's point of view, probably, you would approach a North Dallas banker with a great deal of caution as a juror?

A. As a defense lawyer you would want to get the off.

Q. Okay. As a prosecutor, a social worker, probably you want to get them off.

A. That's true.

Q. Is it fair to say, then, that these are all general catagories, they aren't set rules, "we are going to [67] strike all physicians; we are going to strike all North Dallas bankers; we are going to strike all blacks, all Mexicans, all Orientals," simply because they happen to fit in that category. But they do have a tendency, probably, to empathize with one side or the other, but you are going to approach them with caution?

A. That's right, as a general rule; there are exceptions in every case.

Q. Now, when a defense attorney or a prosecutor says, "What we want is a fair and impartial jury," when talking about jury selection; that's not true, is it?

A. I have never found it to be true, both sides are trying to win the case.

Q. That's right; they're both trying to win. In your experience as both a defense attorney and as a prosecutor, as a prosecutor you want the people on there who are the most prone to convict. Isn't that fair?

A. That's always been my understanding.

Q. As a defense attorney you want people who have more of a tendency to empathize with the defendant, or more prone to not convict?

A. I think that's a defense lawyer's job to do that.

Q. As a result of that, each side having peremptory challenges, the State strikes the people they [68] think are the weakest and the Defense strikes the people they think are the strongest. And as a result, you get twelve fair and impartial jurors. Isn't that about right?

A. That's my understanding of how the system is supposed to work, yeah.

Q. Thank you very much.

THE COURT: Mr. Cunningham?

REDIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. Mr.—I mean Judge Hampton, I am going to give you some statistics about a person, and would you tell me whether or not you think that person would be more State's minded or Defense minded: An individual who is employed by the U.S. Postal Services—

MR. KINNE: Excuse me. Your Honor, I don't believe that the Judge is qualified as an expert. I feel that is irrelevant and immaterial to the motion that they have; who the Judge would select as a juror as either a prosecutor or a defense attorney, since he had nothing to do with the jury selection in this case and did not make policy with regards to the selection [69] of juries in the D.A.'s office.

MR. CUNNINGHAM: Your Honor, I suggest it was opened up by Mr. Kinne's question to him when he asked him about the types of prospective jurors, or prospective persons, that the State would want and that the defendant would want.

THE COURT: I am going to sustain the objection. I think we can probably ask any of these witnesses how they would do something. We all know jury selection has a lot to do with matters such as eye contact and other matters that occur only between the lawyer and the witness. And this witness, even if he were an expert, and he may well be, a description of a hypothetical juror is not relevant to the motion.

MR. CUNNINGHAM: What I was concerned with was whether or not that type of person, from what he said, would be the type of person he would have wanted while he was a prosecutor, or the type of person he would have wanted when he was a defense counsel.

[70] THE COURT: I am going to sustain the objection only because I suspect this witness could be asked a thousand hypothetical questions. I think we can extend this hearing unnecessarily I understand what you are trying to do and I agree to your approach, but I don't think it is relevant. I will sustain the objection

MR. CUNNINGHAM: Your Honor, note our exception.

Q. (By Mr. Cunningham) Judge Hampton, back when you were told by either Mr. Wade or Mr. Allen that—the incident involving the black female. The statement was not made to you that, "If you put another black female on jury and it hangs up you are fired." That wasn't the statement made to you, was it, sir?

A. No, it is not exactly what it was.

Q. In fact, was the statement made to you, quote "If you ever put another nigger on a jury you are fired?"

A I don't recall the word nigger being used, but it was black probably, but that's the way I recall it.

Q. You understand that back in 1958 through '62 we were not referring to ourselves as black then, that is of recent vogue?

[71] A. I didn't know that, I'm sorry.

Q. I think you indicated—well, back in '58 to '62 is when you were in the District Attorney's office. I think you told Mr. Kinne that when you were in private practice, that if you walked in and saw a panel and you saw minorities that your eyes kind of gleemed. Would you expand on that, why you—I guess, why you felt your eyes gleemed, or why you felt that, or something?

A. Well, you certainly hoped to get minorities o the jury. If you were going to have them on the jury you would have to have enough on the panel so the State could not strike them all. If you had more than ten in the first thirty-two then you had a pretty good shot at getting one on the jury panel. That's why you would be happy about it as a defense lawyer.

Q. Would. it also be fair to say that when you walked in, and after you got through examining the panel if there were five in the first thirty-two, you knew what was going to happen to those-five? or you felt sure you knew what was going to happen to those five?

A. You could be pretty sure what was going to happen.

Q. After everybody struck their list what you were pretty sure of had actually happened, those five had been struck. Is that correct, sir?

[72] A. That was usually the case. I am not going to say invariably, but usually, uh-huh.

Q. Thank you, Judge Hampton.

THE COURT: Mr. Kinne?

MR. KINNE: That's all. Thank you.

THE COURT: You can be excused.

LARRY BARAKA,

having been sworn as a witness to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. WEST:

Q. Judge, please state your name.

A. Larry Baraka.

Q. And you are the Judge of Criminal District Court No. 2 here in Dallas County; is that correct?

A. Correct.

Q. How long have you been employed as a Judge there, sir?

A. I—oh, I guess it would be about a year and a couple of months.

Q. Now, how long have you been licensed to [73] practice law?

A. Since 1976.

Q. And did you graduate from the University of—

A. Houston, uh-huh.

Q. Upon graduation, did you get a job, or get—become employed by the Dallas County District Attorney's office?

A. Correct.

Q. Okay. When you came to the office, would you please the tell the Court the number of assistants, if you recall, that were in the office?

A. The number of Assistant D.A.'s? Would you—I don't know, ninety. I don't know.

Q. How many black assistants?

A. Myself.

Q. You were the only black assistant?

A. Uh-huh.

Q. Okay. Is it also true that you were the first black to be promoted to the Criminal District Courts, felony courts?

A. Correct.

Q. Do you recall the year that was?

A. Probably '78.

Q. How long did you stay with the District Attorney's office, sir.

[74] A. A little—a little less than two years, probably about short of two months, maybe. I don't know. Now, while

working with the D.A.'s office, did you have occasion to participate in and observe many jury trials?

A. Yes.

Q. Do you have any observations concerning the ethnic composition of those cases?

A. You mean the voir dire panel, or jury panel itself ?

Q. The jury panel itself.

A. Specifically?

Q. As far as ethnic composition; black, white et cetera.

A. Well, on occasion there were blacks on the jury. If you mean-in terms of did I see more white juries or juries with blacks than what—

Q. Yes, sir.

A. I tended to see more white juries.

Q. Well, as a Criminal District Judge have you had occasion to talk with prosecutors, and exclude prosecutors from your court as a result of systematically excluding blacks?

A. Well, I only had one occasion where I excluded prosecutor from conducting voir dire in my court.

[75] Q. Would you tell the Court the reason that you did that?

A. Well, from observing the voir dire and listening to the responses of the voir dire panel, and seeing about, I guess, maybe ten blacks struck; in my mind I didn't see a just cause for it and my perception was they did it because they were black.

Q. You say "they did it," who did it?

A. The prosecutor.

Q. The prosecutor. And that prosecutor was barred from your court; is that correct?

A. Correct. Well, not barred from my court. He and I - worked out an understanding: He could try cases in my court any time he wanted to. I just advised him that if he chose to practice law in terms of picking juries in the manner that he chose to do, that he could not do it in my court.

Q. Judge Baraka, on Sunday March 9, 1986 you were quoted in the Dallas Morning News by a couple of Morning News reporters. One of the quotes, I will ask you, was. it an accurate quote? "I am in shock — and you were quoted in an article dealing with Race Bias Pervades Jury Selection. You were quoted as saying, "I am in shock, I thought things had gotten a lot better but apparently they haven't." Is that an accurate quote?

[76] A. Yes.

Q. What did you mean when you said that, sir?

A. Well, I thought things had improved considerably, from my observations at least, from I would say, at least, 1980. Even in private practice I tended to see blacks sitting on juries more often than I had on previous occasions. Oh, I kind of figured to a degree that, that practice, or that systematic practice of excluding blacks had somehow cut down, and as more prosecutors were coming in the attitude was changing.

Q. Do you have an opinion as the to whether or not there's been a systematic exclusion of blacks by the State from juries?

A. I would say in the past, yes.

Q. What is that opinion based on?

A. Observation.

Q. That observation—those observations are based on your experience?

A. I said as a prosecutor having tried cases and as a defense lawyer, and I guess being up here now in terms of watching trials being conducted and voir dire.

Q. That's a very honest answer, isn't it, judge?

A. As honest as I can be.

Q. Is it an accurate quote that you indicated blacks have been so conditioned to be discriminated against [77] in the judicial system that many do not consider jury service as a possibility.

A. From conversations I have had with people. It's been told to me on numerous occasions, of their having been

instructed to appear and very few actually believe they will be chosen. That, again, is isolated from the people I talk to, so. . . .

Q. About your opinion: Is there—has there been systematic exclusion of blacks from jury panels by the State? Is that correct; that's based on your past observation as a prosecutor, and as a defense attorney and as a Judge?

A. Past experience, yes.

Q. Okay. Would you tell the Judge—you alluded to the fact earlier that you had a conversation with a prosecutor about what you believed to be systematic exclusion of blacks. Would you tell Judge McDovell when that occurred, what year it occurred?

A. Oh, it occurred last year, I don't really remember.

Q. Not the new year, but in 1985?

A. 1985.

Q. Thank you, Judge.

MR. WEST: No further questions.

THE COURT: Cross examination?

[78] CROS EXAMINATION

BY MR. KINNE

Q. Judge, when you say systematic exclusion, are you talking about systematic exclusion by individual prosecutors?

A. Yes, individual prosecutors.

Q. Is it not a fact, that in the District Attorney's office there are—Of course, certain hints are given to you as a new lawyer as to how to pick a jury, what to look for in individuals that you put on a jury; is that correct?

A. True. Sometimes, it is not even a question of someone telling you to do this or to do that. You come in and you just watch. people, you give them credit for being more experienced and you just follow their lead.

Q. Okay. And I take it what you are saying, then, is there are individuals that you have worked with in the D.A.'s office who systematically excluded, in this case blacks, from juries?

A. Correct.

Q. You are not telling us that was the policy of the District Attorney's office?

A. Quite honestly, in terms of actual policy for [79] instance, where Henry Wade says, "This is what you will do," I honestly can say I never had that happen. But, again, it was so pervasive that on one occasion when I was in the D.A.'s office, that blacks were excluded, and I suggested to the people I was working with I didn't want that to happen anymore. And, quite honestly, it never happened again, to me or—Again, no one even approached me or approached me on that topic. I didn't get any reaction in the sense no one came down on me, or told me I was crazy for wanting to do that. So, I think it was more question of the person handling the cases, themselves, to But, once again, they're learning from other people though.

Q. You apparently had people working with you that you felt systematically had excluded blacks, and you told them not to do that?

A. I don't think it was even a question of thinking. In the instance that it happened they told me that they did it for that reason.

Q. But you told them don't do that, and as far as you are concerned they quit?

A. I know it never happened again, either if I led the case or picked a jury, blacks were on the juries.

Q. Anybody ever tell you while you were Assistant District Attorney, "Don't put blacks on the jury?"

[80] A. Never.

Q. Incidentally, these prosecutors that you are talking about, that you have reference to; you know of course myself, and Mr. Macaques and Mr. Nelson. Are any of the three of us any of the people you are talking about?

A. I never had any experience working with you guys at all?

Q. All right. Thank you, Judge.

REDIRECT EXAMINATION

BY MR. WEST:

Q. Judge, let's talk about policy, oral and written policy. Do you recall being in the D.A.'s office, in your early years in the D.A.'s office, the oral policy about mustaches?

A. Yes.

Q. Would you tell the Court about that oral policy and some of the exemptions from that policy?

A. Well, quite honestly—

MR. KINNE: Excuse me. Is there a motion having to do with mustaches? If there's not I fail to see—

THE COURT: If there is I am in trouble. I will have to disqualify.

[81] A. That wasn't a policy either, that was an individual who had that attitude, that was not a policy of the office because I wore a mustache.

THE COURT: If that was an objection, Mr. Kinne, I am going to sustain it. What does this have to do with—

MR. WEST: Well, Judge, talking about policy. Policy can be written policy or oral policy, we need to explore the types of policy that were handed down.

THE COURT: Mr. West, I am hard pressed to relate that to the motion. I think the motion in hand is very viable and substantial, the one having to do with racial bias. If Mr. Wade had a policy about mustaches I don't see what that relates to in this case.

MR. WEST: Note my exception, Judge.

THE COURT: If it relates to what Judge Baraka's impression was regarding jury selection, I think it is fine, but

I think it is probably carrying this far afield. I will sustain the objection.

MR. WEST: Note my exception.

THE COURT: Go ahead.

[82] Q. (By Mr. West) Judge Baraka, did you ever have an occasion to read the handout, or parts of a particular manual dealing with the exclusion of minorities from juries?

A. Yeah, I have seen a manual such as that.

Q. When you were in the District Attorney's office did you see it?

A Correct.

Q. And you joined the D.A.'s office in 1978?

A. '76.

Q. '76. Was that a manual used by new prosecutors?

A. It is a manual that is given to prosecutors who have attended a particular course or seminar; generally, they were new prosecutors, misdemeanors. That's correct.

Q. In 1976?

A. No, I didn't actually go until 1977.

Q. To the D.A.'s office?

A. No, into the courts. The 1976 manual, to the best of my recollection, was the last manual with the particular section you are regarding with race biases. And the manual that I got in 1977, if I am not mistaken, I don't think that was in it.

Q. But those manuals were still available?

[83] A. What year did you leave the D.A.'s office?

A. '78.

Q. When you left in 1978, was the manual still widely circulated?

A. Honest to goodness, I don't know, in terms of the '76 manual. I don't know.

MR. WEST: No further questions.

MR. KINNE: That's all.

RALPH TAIT,

having been sworn as a witness to tell the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. WEST:

Q. Sir, would you please state your name.
A. Ralph Tait.
Q. And how are you employed?
A. As the Chief Public Defender for Dallas County.
A. Well, yeah, I saw it. I have seen the '76
Q. How long have you been so employed?
[84] A. Since November of 1983.
Q I'm sorry?
A. November of 1983.
Q. Now, what are the basic jobs and responsibilities of the Chief Public Defender of Dallas County?
A. I direct the activities of attorneys that are assigned to four felony courts and two misdemeanor courts to represent indigents charged with misdemeanor and felony crimes in Dallas County.
Q. Now, you were quoted in an article that appeared in the Dallas Morning News, that appeared Sunday, March 9, 1986. The subject was, you routinely warn black clients that juries are widely composed of mostly white housewives and red-necks from the suburbs who have very little contact with them; is that correct?
A. That's correct.
Q. Now, what did you base that statement on, sir?
A. That was based on my observation of twenty years of law practice in Dallas County.
Q. Twenty years of law practice and your observations in that twenty years of law practice. Was that as a defense lawyer or a combination of other experiences?

A. No, mostly as a defense lawyer. I spent two [85] years as a prosecutor but—
Q. I'm sorry.
A. I spent two years as a prosecutor, but not really based on that experience.
Q. What years were you in the D.A.'s office?
A. 1966 through '68.
Q. '66 through?
A. Through '68.
Q. Okay. Now, would you tell the Court your experiences in the—First of all, were you in misdemeanors and also a felony prosecutor?
A. I was a misdemeanor prosecutor.
Q. Would you tell the Court, based on your experiences as a misdemeanor prosecutor, whether there was any type of unwritten rule concerning excluding blacks?
A. My recollection from those years was that we had, unlike what Boyd's done now, there was no school, or training, or handbook. And we pretty much learned from the lawyers in the court with us. And I recall no office policy as far as excluding blacks. Now, some attorneys felt that was very—some D.A's felt that was very important, but in '66 through '68 you did not see many black people on jury panels.
Q. You said some D.A's thought that was very important?
[86] A Back then, yes.
Q What do you mean when you say "thought it was very important"?
A. It was important to exclude blacks from juries.
Q Okay. Was that carried out during those particular year, blacks being excluded from the jury?
A I can't speak for the whole office, and again I cannot recall trials that I was specifically in where—I can recall no trial that I was specifically in that I was asked, or told to do that, from my D.A.'s experience. That's why I say my

experience from the D.A.'s office had very little to do with what I said to reporter about what our clients will face.

Q Okay. So, your experience in private practice—

A Yes.

Q —Were the basis of your statement in the paper?

A Yes.

Q Would you relate to the Court your experiences in private as to blacks serving on juries?

A It is my experience, after approximately eighteen years of doing Defense work, that in very few cases will a black juror remain, will actually be on the [87] jury, will make it through the panel and come on a jury.

Q And more often than not, would it be a fair statement to say, nine out of ten blacks are going to be struck by the State, based on your experience?

A. In the cases that I am—I have been involved in, in either picking a jury or trying the case myself, have—I can never recall a case in which either I, or a lawyer associated with me in the defense trial, struck a black juror. And in very few of the two-hundred and fifty or so jury trials I have been involved in, in probably less than fifteen or twenty, was there ever a black juror that was—that served on a jury.

Q. Now, is the reason that you didn't strike the jurors because you just assumed that the State was going to do it?

A. In deciding who we were going to strike, either I or the lawyer I had been working with, we have many times made the assumption that the State would strike the black and Hispanic jurors.

Q. Why did you make that assumption?

A. Experience.

Q. Experience?

A Yes, seeing it occur—

MR. WEST: No further questions.

A. —over an eighteen year period.

[88] Q. (By Mr. West) One other question. You are talking about, both misdemeanor and in felony court cases?

A. Well, I would say more criminal felony than misdemeanor court because of the number of strikes.

Q. Based on experience?

A. Yes.

THE COURT: Mr. Kinne, any questions by the State.

CROSS EXAMINATION

BY MR. KINNE:

Q. Mr. Tait, you indicated that while you were a Assistant District Attorney, as far as you were concerned, there was no policy in the District Attorney's office with regard to excluding any minority from the jury simply because of their race or religion?

A. My recollection of that period, '66 through '68, was: I can say that I was never told that that was required to be done or that was office policy. There were some lawyers who felt it was best to be done, and I considered that to be their prerogative, or how they felt about it.

Q. Those lawyers that you are talking about; of course, you know myself, you know Mr. Macaluso and Mr. [89] Nelson. Are any of us one of those lawyers?

A. You were not in the office by the time I left.

Q. All right. So, I take it the answer to the question is no?

A. That's correct.

Q. When you say that you assumed that the State would strike minority members of the jury; is that simply because they were a member of some minority, or because they had a tendency to empathize with the defendant, or not be strong and law enforcement minded like the State would like?

A. I cannot testify as to why another lawyer would strike someone, I merely tell you that my observation has been that those black jurors who are qualified and who make it into the

last thirty-two, that very few of those serve. Now, as to-why they're struck, I couldn't tell you.

Q. But even going as far back as to when you were in the D.A.'s office, I think you have told us that you picked juries and you put members of minorities, including blacks, on juries; is that correct?

A. I do not recall. And, again, my recollection of that period, '66 to '68, was that we saw very few minority jurors in the panel.

Q. Okay.

A. I do not recall specifically striking or [90] putting them on, or anything, from that period of 1966 to '68 that I was involved in.

Q. You don't know whether you struck any minorities, or you didn't, or you don't recall?

A. I don't recall.

Q. It was not policy, at any rate.

A. The—if it was policy, it was not known to me.

Q. Nobody ever told you, "If you put a black juror on there you are fired?"

A. That's correct.

MR. KINNE: That's all. Thank you.

THE COURT: Anything else?

MR. WEST: That's all.

(An off the record discussion was held out of the hearing of the court reporter.)

[91] NORMAN KINNE,

having been sworn as a witness to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. State your name.

A. Norman Kinne.

Q. How are you employed?

A. I am an Assistant District Attorney in Dallas County, Texas.

Q. How long have you been employed as an Assistant District Attorney for Dallas County, Texas?

A. Fourteen years four and a half months.

Q. And have you served both in misdemeanor and felony courts?

A. Yes, sir.

Q. I will ask you—I will ask you whether or not you are referred to now as the Chief Felony Prosecutor?

A. I—yes, sir.

Q. And you are the prosecutor that will put on the testimony in the case styled the State of Texas versus Thomas Joe Miller-E1?

[92] A. Yes, sir.

Q. I will ask you, Mr. Kinne, how many capital murder cases have you tried?

A. Eleven or twelve.

Q. And that's over your fourteen to—over your fourteen year—

A. Yes, sir.

Q. —time that you have been in the D.A.'s office?

A. Well, that includes one before I came to the D.A.'s office, when I represented—

Q As a defense counsel?

A. Defense Counsel, yes, sir.

Q So, you have got one as a defense counsel?

A. Yes, sir.

Q The one where you were the defense counsel, were there any blacks on that jury, the final jury?

A. I don't recall. I know there was one Latin or Hispanic female, I remember that.

Q. On the one you tried as a defense counsel, were there any blacks on that jury, the final jury?

A. Yes, sir.

Q. You do not recall any black male or female on that jury?

A. I just don't recall right now.

Q. How many—did you try any capital murders [93] during the year of 1985?

A. '85? No, sir.

Q. Last year?

A. No, sir.

Q. What about '84.

A. Yes, sir, I believe so.

Q. How many did you try in '84?

A. It is kind of hard for me to keep track of them by years, but I think we tried two.

Q. Were any blacks on those?

A. I don't recall.

Q. Were there any black jurors finally selected to sit in the two cases that you think you tried in 1984?

A. Mr. Cunningham, I don't keep track of how many blacks, or whites, or reds, or yellows are on a jury. I don't remember.

Q. Do you recall a black being on any of the eleven or twelve juries, capital murder juries, that you have tried?

A. Yes, sir.

Q. Yes, sir, you, do recall some, or you don't recall some?

A. Sure, I recall some, yes, sir.

Q. Tell me when was the first time you put one on a capital murder jury.

[94] A. I can't tell you, but I know there have been blacks on most of the cases I have tried.

Q. Do you know the names of the last—do you know the names of the capital murder cases that you tried.?

A. I recall some of them, I don't recall all of them.

A Those that you recall, would you give me the names?

A. David Wayne McKay, Harold Joe Lane, Tommy Mann. Some of those I assisted in, you understand.

Q. Okay, I understand that. When you say assisted, that would have meant you would have been in the jury selection process and someone else was putting on the evidence?

A. Yes, sir.

Q. Go ahead.

A. John Fearance.

Q. How do you spell Fearance?

A. F-e-a-r-a-n-c-e. I just can't recall any of the other names right now.

Q. Do you remember whose court David Wayne McKay was in?

A. I believe it was Judge Chapman, I am not positive.

Q. What about Harold Joe Lane?

[95] A. I think that was Judge Meier, I believe. Tommy Mann?

A. Judge Chapman.

Q. And John Fearance?

A. I think that was Judge Mead at the time, I believe.

Q Those are all that you can think of right now?

A Those are all the names I can recall right now.

MR. CUNNINGHAM: That's all, Your Honor.

THE COURT: Mr. Macaluso, any questions?

MR. MACALUSO: No questions.

THE COURT: Do you have anybody here now?

PAUL MACALUSO,

having been sworn as a witness to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. CUNNINGHAM:

[96] Q. State your name, please.

A. Paul Macaluso.

Q. And are you employed, sir?

A. Yes, sir?

Q. Where are you employed?

A. Dallas County District Attorney's office.

Q. How long have you been so employed?

A. Thirteen years.

Q. And you have been—have you worked in both misdemeanor and felony courts?

A. Yes, sir.

Q. And what position do you hold now with the Dallas County District Attorney's office?

A. I am the chief prosecutor assigned to Judge Loving 's court.

Q. That's the 282nd?

A. Yes, sir.

Q How many—I will ask you whether or not you have had an occasion to try, either as the one that put on the evidence, or as one of the two Assistant D.A's that picked the jury, any capital murder cases?

A. Yes, I have.

Q. Can you tell the Court, approximately, the approximate number of cases, of capital murder cases, that you have participated in?

[97] A. Eight to ten, twelve, somewhere along there.

Q. Have there been any where you were the one that was putting on evidence?

A. No.

Q. In other words, all of yours, all of your eight to ten to twelve, would have been in the process of selecting the jury and making the determination of how the peremptory strikes should be used?

A. Yes, sir.

Q. Do you recall the names of any of the cases that you have participated in?

A. Yes, sir.

Q. Would you tell me what they are, sir; and if you remember, the court also?

A. Danny Lee Barber in Judge Zimmermann's court in 1980, I believe. Howie Ray Robinson in 1977 or '78, I don't recall which.

Q. Whose court was that in?

A. That was in Judge Mays' court. David Wayne McKay, I believe that was in Judge Chapman's court. Montoya was the last name, that was in Judge Loving's court.

Q. The 291st?

A. 282nd.

Q. 282nd.

[98] A. And Ronald Curtis Chambers.

Q. Ronald Curtis Chambers?

A. Yes, sir. And—

Q. Whose court?

A. Judge Maloney's court.

Q. Okay.

A. There are some others I have participated in, others I filled in and assisted in other cases.

Q. Do you recall whether or not there were any blacks that were actually selected to sit as a juror in Danny Lee Barber's case?

THE COURT: Which case, Danny—

MR. CUNNINGHAM: Danny Lee Barber.

A. I don't recall.

Q. What about Howie Ray Robinson?

A. Yes, sir, I do recall there was.

Q. Sir?

A. What was your question again?

Q. Was a black selected to sit as a juror in Howie Ray Robinson?

A. Yes, sir, there was.
Q. There was one?
A. Yes, sir.
Q. What about David McKay?
A. There may have been, but I just don't recall. [99] Oh, I left out—I remember some other cases now. I can think of some others.
Q. Is McKay—you don't know.
A. I don't recall; that's right.
Q. What about Montoya?
A. I think there was, but I am not sure.
Q You are not sure? I will put a question mark.
A. I am pretty sure there was, though.
Q. What about Ronald Chambers?
A. No, I don't think there was.
Q. You said you remember some other cases?
A. James Edward Nolan.
Q. James who?
A. James Edward Nolan. That was in Judge Mays' court.
Q. Judge. Mead?
A. Mays.
Q. Any blacks on the jury?
A. Yes, sir.
Q. Finally selected?
A. I think there were.
Q. How many?
A. A couple.
Q. Do you remember any other cases?
A. I am sure there are two or three, four other [100] cases that I participated in, but not from start to finish.
Q. What about Bobby Joe Daniel; did you participate in that one?
A. I don't think so, that doesn't ring a bell.
Q. Michael Wayne Evans?
A. No.

Q. Stanley Keith, to the best of your recollection?
A. No.

MR. CUNNINGHAM: Pass the witness.

THE COURT: Mr. Kinne, any questions?

MR. KINNE: No questions.

THE COURT: That's it, Mr. Macaluso. Do you want to call Mr. Nelson to the stand?

MR. CUNNINGHAM: That's all for right now; Judge.

THE COURT: Ready to go?

MR. WEST: We are ready to proceed.

HAROLD ENTZ,

having been sworn as a witness to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

[101] DIRECT EXAMINATION

BY MR. WEST:

Q. Would you please state your name.
A. My name is Harold Entz.
Q. What is your profession?
A. I am Judge of County Criminal Court No. 4 in Dallas.
Q. How long have you been Judge of County Criminal Court No. 4?
A. Twelve and a half years.
Q. Twelve and a half years? Prior to becoming a Judge in that particular court, did you hold any other type of employment?
A. Private practice immediately prior to that. And prior to that, I was a prosecutor in the Dallas District Attorney's office.

Q. What years were you a prosecutor in the Dallas County District Attorney's office?

A. '67 through '69.

Q. Now, while in the Dallas County District Attorney's office did you have occasion to practice in both county and district court?

A. I did.

Q. Now, could you tell the Court whether or not [102] you had any, during the period of your practice in the District Attorney's office—and I assume that you did try cases?

A. I did.

Q. Did you ever have any blacks on your jury?

A. Yes.

Q. Okay. Did you ever know of any type of policy to exclude blacks from juries?

A I did not.

Q. Did you have occasion to, while in the District Attorney's office, read any type of handout that was prepared by John Sparling?

A. No.

Q. Okay. Now—

A. Unless—I believe the article about which you make reference was written after I left the District Attorney's office.

Q. And you entered into private practice?

A. That article was written in '77?

Q. I think '69.

A. No, I was not aware of that. I was not aware of that article till later.

Q. While in private practice did you have occasion to try both county, and misdemeanor, and felony cases?

[103] A. I did.

Q. Do you recall any trials during that period -what period of time are we talking about here?

A. I was appointed June 18, 1973.

Q. From the period of '70 to '73, do you recall any juries where the State—strike that. Do you recall any juries where you had blacks on them?

A. Mr. West, I can't recall one way or the other,, to be perfectly candid with you. I just don't remember.

Q. Okay. Now, as a Judge for the past twelve years, have you had occasions where the State would seek to, change the composition of a jury panel?

A. I have.

Q. Would you—

MR. CUNNINGHAM: What did he say? .

MR. WEST: "I have."

Q. (By Mr. West) Would you elaborate on that, sir?

A. Mr. West, it was within the past three or four years, the State made a request to. shuffle the jury. This was about the time when numerous Dallas County cases were being reversed for the refusal of the Judge to permit a shuffle. Being well aware of those appellate opinions I granted the State's request. And while the process of the shuffle was being completed, the State volunteered the [104] information that they requested a shuffle because a predominant number of the first six, eight or ten jurors were blacks.

MR. WEST: No further questions.

THE COURT: Mr. Kinne, any questions of Judge Entz?

CROSS EXAMINATION

BY MR. KINNE:

Q. Judge, let me ask you: You know, of course, myself, Mr. Macaluso and Mr. Nelson; is that correct?

A. Yes, sir. Other than you, the other two gentlemen have been assigned as prosecutors by your office to my court at one time or another, as has Mr. West.

Q. During the time that Mr. Macaluso and Mr. Nelson served in your court, I presume that they had occasion to pick juries; is that correct?

A. Many, many times.

Q. All right. During the time that Mr. Macaluso and Mr. Nelson were there, the juries that they picked; do you recall there being minorities on those juries, blacks and Latin Americans?

A. Mr. Kinne, though with specificity I cannot pinpoint certain defendants, I am not aware of their [105] excluding racial minorities when they were prosecutors assigned to my court on a systematic basis.

Q. All right, fine. This prosecutor who made made this request for a shuffle which you apparently overheard him say was because—

A. Hearsay.

Q. Hearsay, right. Because there were too many blacks apparently in the front of jury panel; is that correct?

A. Correct.

Q. I guess it is needless to ask since you said it was hearsay; it wasn't one of the prosecutors involved in this case?

A. No, it was not.

Q. Then, as far as you are concerned during your tenure with the D.A.'s office, and since—and during your tenure as a Judge here in Dallas County, as far-as you are aware, there's never been a policy with the D.A.'s office to systematically exclude people from juries merely because of their race?

A. I am not aware of one.

Q. Thank you.

THE COURT: Mr. Cunningham or Mr.—

MR. WEST: Nothing further.

THE COURT: Judge, thank you. You [106] can be excused.

MR. CUNNINGHAM: I want to call Judge Kindeade, if I could, out of order. He's got a jury trial he is trying to get back to. I thought we should accommodate him.

ED KINKEADE

having been sworn as a witness to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q State your name, please.
A Ed Kinkeade.
Q What is your business or profession?
A I am a lawyer.
Q And how long have you been practicing?
A Since May of 1974.
Q Do you hold any elected office as of this
[107] A. Yes.
Q. And what elected office do you hold?
A. I am Judge of the 194th District Court here in Dallas, Texas.
Q. How long have you been Judge of the 194th District Court of Dallas County, Texas?
A. Since September 1st, 1981.
Q. For the purposes of the record, is that a felony court or misdemeanor court?
A. A felony court of general jurisdiction, but we primarily hear felonies.
Q. Do you have any connection with the central juryroom? Are you the Presiding Judge for the central juryroom?
A. Not anymore, I was last year.
Q When did your term expire?
A We appointed somebody else two or three weeks ago

Q. So, up until two or three weeks ago you were the Presiding Judge with—

A. Of the—Presiding Judge of the central juryroom, yes, sir. That's correct.

Q. Okay. To your court, I believe, you have felony prosecutors assigned; is that correct, sir?

A. Yes, sir.

[108] Q. Have you had an opportunity to read article that was contained in the Dallas Morning News on Sunday, March 4, 1986, entitled Race Bias Pervades Jury Selection, Prosecutors Routinely Bar Blacks, Study Finds?

A. I read some of it.

Q. And I believe there was a follow-up article o Monday, March 10; did you read that one also?

A. I read that one.

Q. And I will ask you whether or not, as a result; of your having read the articles contained in the Dallas Morning News pertaining to jury selection, you had cause to do anything in your particular court with respect to the selection of minorities to juries, on juries in your court?

A. To that question the answer is no.

Q. I will ask you whether or not you have proposed, or are in the process of thinking about proposing to the Judges, that they, that the Judges, will tell the prosecutors that the exclusion of minority jurors solely for racial reason will not be tolerated? Will not be tolerated is my words, maybe there are other words that you used.

A. Should not be tolerated now.

Q. Should not be tolerated now?

A. Yes.

Q. Okay. I will ask you whether or not the [109] reason you are urging this to your other judicial colleagues, to take these steps to halt prosecutors from systematically barring minorities from trial juries, is a result of your having read the articles either Sunday or Monday in the Morning News dealing with race bias and jury selection?

A. Oh, probably partly but not primarily.

Q. You say partly it is because of what you read but not primarily? Are there other reasons why you propose to urge your judicial colleagues to take steps to halt prosecutors from systematically barring minorities from trial juries?

A. It is my personal feelings, what I think is fair and just in my job.

Q. Your personal feelings is why you propose urging this to your other colleagues, realizing that you cannot make them do anything, but you can ask them to do it

A. Right.

Q. Tell us your personal feelings.

A. About what? I will be glad to.

Q. Okay. You propose to urge to your judicial colleagues to take steps to halt prosecutors from systematically barring minorities from trial juries. Do you propose doing that, sir?

[110] A. Well, I have done that already in my court, but I am going to propose that, or suggest to the other Judges that they consider doing something individually in their courts. I don't have any authority to tell any other Judge how to do anything, but I am going to talk to them about it, and then everybody is going to make their own decision based upon what they think is right.

Q. Now, I understand that you said you have already done it in your court?

A. Right.

Q. Would you tell me what you did in your court to attempt to assure that minorities are not barred from sitting on trial juries?

A. That if you don't question a minority prospective juror you are going to have to put on the record why you are using a peremptory strike if all are used against minority veniremen.

Q. In other words, to see if I understand: If there are, say, six minorities in the first thirty-two, all thirty-two being qualified and there have been no challenges to the minorities

in your court, the State is going to be required to state why the minorities are being struck?

A. If they're only striking minorities with their peremptory challenges, or some vast majority, if that's

* * * *

[114] excluding minorities, I hope does not include anyone of us three.

A. I don't think you have ever tried anything in front of me.

Q. Therefore, the answer is no; is that correct?

A. Well, that was my answer.

Q. And I take it what you are telling us is that you have had individuals in your courtroom, prosecutors, who you felt were excluding minorities based solely on the fact that they were minorities?

A. I can't read their mind, but I have seen them use their strikes solely on minorities to strike every minority.

Q. Well, let me ask you: It was your opinion, then, based upon what you observed of certain individuals, that these individuals were systematically excluding a particular group. Is that correct?

A. I don't know if they're systematically excluding a particular group, I just know they struck every minority on the panel. It might not have taken ten strikes, but they did strike every minority in the first thirty-two.

Q. Whether it was systematic or not, you don't know why they struck these minorities, but they did?

A. That's right.

[115] Q. Okay. And you are saying that you have prosecutors in there now, in your court, apparently who do not do that?

A. That's right.

Q. And you have had other prosecutors in your court who do not do that?

A. That's correct.

Q. Would that lead to the conclusion that there is no policy in the D.A.'s office of Dallas County to systematically exclude blacks?

A. Must not be because I get juries with minorities on them with some sets of prosecutors; that's correct.

MR. KINNE: That's all.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. I'm sorry, were your last words, "with some sets of prosecutors"?

A. Right.

MR. CUNNINGHAM: That's all, Your Honor.

THE COURT: Thank you, Judge, you can [116] stand down.

JOHN STAUFFER,

having been sworn as a witness to tell the truth, the who 16 truth and nothing but the truth, testified on his oath as follows:

BY MR. CUNNINGHAM:

Q. State your name, again, please.

A. Stauffer.

Q And I believe you have to get back to your office in order to meet a paying client?

A. Hopefully, the client will show up with the money, I hope. A lot of times, you know, they say they're coming and bringing the money, but either they don't appear or they come without the money.

Q. The reason I asked that is probably, if you are direc in answering my questions and Mr. Kinne's questions, you will be able to make it okay.

A. I will be as brief as I can.

Q. What is your business or profession?

A, I am in the private practice of law.

Q. How long have you been in the private practice [117] of law?

A. Almost seven years.

Q. Have you ever been employed by the Dallas County District Attorney's office?

A. Yes.

Q. When were you employed by the Dallas County District Attorney's office?

A. From September of 1964 until June of 1979, fifteen years approximately?

Q. Sir?

A. Approximately fifteen years.

Q. I will—and you were in the office at the time a manual was prepared by John Sparling dealing with he selection of jurors; is that correct, sir? Or do you remember that?

A. Well, it was a paper that he prepared for a manual.

Q. Okay.

A. The manual was a contribution type of thing. Many speakers who were teaching at the District and County Attorneys Association Annual School For Prosecutors, they would prepare a paper to go along with their oral presentation. It was a handout, but those were gradually colleced and they made a manual.

Q. Was the manual updated from time to time from—while you were in the District Attorney's office up until he time you left in '79?

A. The first three years that we had the manual it was updated every six months, because the school was every six months. Then the grants ran out, and when we go' the new

grant it was just to be annually, so they only revised the manual once a year after that.

Q. This manual was for use by who?

A. Well, originally the District Attorney had established a chair in the D.A.'s office called the Director Of Training.

Q. Okay.

A. And the county didn't feel—the Commissioners didn't feel they could support that, that they had the funds to do it. So, the District Attorney applied to the Federal Government for a grant in order to have a training program, in-house program so to speak, for the prosecutor's staff. We got the grant in 1971 and it was for three years, and I was the one that—the grant only called for one hired employee, and I was the one that was the hired employee. In other words, the county really was reimbursed for my salary during that period of time from the grant. And the grant also had money in it for the printing of the handout material that went with the-school.

Q. And I believe you said that that continued— [119] initially, it was reviewed every six months, then after the grant, the second grant, it was renewed once a year?

A. That's correct.

Q. And was the second period for three years, an! additional three years?

A. Yes. There was—there was a gap of five months between the ending of the grant of three years and our getting it reestablished. We had a five month hiatus in there.

Q. This manual was for the use and benefit of the persons employed by the Dallas County District Attorney's office. Is that correct, sir?

A. Yes. But the grant, the application for the grant. when we presented it we were asked by people in Austin who administered the federal money that was given to this state, they asked us if there were any prosecutors outside of Dallas County that might want to come and attend, if we would object to that. And we thought they were talking about Waxahachie, or McKinney, Collin County, Midland—I don't

mean Midland, maybe Greenville. So, we said yes, not realizing that when we started it people , would be interested from all over the state. And pretty soon we had people coming to attend the course from a hundred and sixty-five counties. Came from as far away as El Paso.

[120] Q. These was either District Attorneys or County Attorneys?

A. Or their assistants.

Q. Or their assistants?

A. Yeah.

Q. Were you the person that was in charge of this program the entire six years that it was in force and effect?

A. Yes. When we no longer had our second grant, when that three years ran out, it was then taken over by the Texas District and County Attorneys Association. They already had a grant and they added money to their grant for them to take it over. By this time, people looked forward to coming to it from all over the state. We would have representation there from maybe two-hundred twenty counties, even investigators came sometimes.

Q. Okay. While you were in the District Attorney's office did you have occasions to try any capital murder cases?

A. Yes.

Q. Can you tell us, roughly, how many you tried?

A. Oh, I can't give you a figure on it, but three or four at least.

Q. Okay. During—well, were there any black jurors on any of the three or four capital murder cases [121] that you tried while you were in the District Attorney's office?

A. Yes.

Q. Can you tell us—well, did you have a black on each of the three or four?

A. No. I remember one particular case very well,! it was about fifteen years ago, it was either 1970 or 71, wherein we had a black defendant. I think most of the other death penalty cases that I participated in we had white defendants, it just so

happened, the ones I was on. But there was a case, it was one of the Blitz Bandit cases. The media referred to it as the Blitz Bandit because they would blitz in and blitz out of a business establishment and perform an armed robbery. And in one of those blitzing in and blitzing outs they shot and killed the white woman proprietor of this little store. And she had a black employee in there who was a butcher in her little store, and they made him lie on the floor but he got to see everything. So, we were trying that case for the electric chair. This was back when the law provided for the electric chair, under the old law. And the victim was a white woman, the defendant was a young black male. On the jury in that case there was one black member, and he was elected foreman, and we did get the electric chair in that case. That was in Judge Scales' court, the 195th.

[122] Q. Can you tell us, roughly, when that was?

A. Well, it was either 1970 or 1971. I left when—when the grant came through in '71, then they took me out of the court as a regular prosecutor assigned to one court and I became, well, the Director of Training, but occasionally I would still try a case now and then.

Q. How long did the jurors stay out on guilt or innocence?

A. They stayed out, altogether, eleven hours.

Q. Was the black juror the cause of the jury staying out as long as they were?

A. No, I learned later in talking with him well, this may be several months after the trial was over t- I visited with him one day and he explained to me what the hold up was on it, why it took them eleven hours to reach a guilty.

Q. It was not him?

A. No.

Q. How long did it take them to reach a verdict on the electric chair?

A. One hour.

Q. On the other two or three—well strike that. Up until that time you would have been in the District Attorney's office how long?

A. About seven years.

123] Q. Okay. Would that have been the first black, that you know of, that had served on a capital murder jury?

A. It was my understanding that that—when this black man was taken as a juror in the case I just mentioned about the Blitz Bandit case, that I had the distinction at that time of being the first prosecutor in the state trying death penalty case—not just here but anywhere in the state—wherein the accused citizen was a black person an the victim was a white person, wherein a black person ended up on the jury. I sort of wear that proudly.

MR. CUNNINGHAM: Pass the juror. Pass the witness.

THE COURT: Cross? Oh, I am sorry.

Q. (By Mr. Cunningham) Mr. Stauffer, I show you what's been admitted as Defendant's Exhibit No. 1, and ask you whether or not you have had occasion to see that document before?

A. Yes, I think I have.

Q. Would that have been the document written by John Sparling pertaining to the selection of jurors?

A. Yes, it is.

Q. And was that document included in the manual that—well, in '71 you became Director of Training; was that document included in all of the—

[124] A. As I recall.

Q —training manuals?

A. As I recall, Mr. Cunningham, I got him to write this. In other words, when we were trying to prepare the manual to square up to the obligations we had made on the grant. In other words, when we applied for the grant one of the things we said we would do would be to prepare a, training manual. And I asked all of the people who were assigned to speak on

different subjects at the school to prepare a paper that went with their talk. And so, that is how this came to be written in the first place.

Q. Would it have expressed the policy of the office with respect to how jurors were selected?

A. Well, I don't necessarily think it would express the policy of the office, the office didn't really have any set policy. It was Mr. Sparling's, John Sparling' s, idea of—in-picking a jury, just generalities.

Q Well, he wrote it and it became of such — it must have been of such good quality because you included it in your manual, didn't you?

A. I included all—everybody that was good enough to take the time to speak at our school, because there was no money for them. Those who took the time to prepare a presentation and to prepare a paper to go with [125] it, I was very grateful to them.

Q. And you put it in the manual?

A. We did.

Q. And you reviewed the manual, and if there were, changes you took out what was not of any force then?

A. At one time I remember he talked to me about He said, "I am not sure that I want my paper to be published anymore," after it had been in there maybe through two or three editions, back when we were doing it every six months. He said he would like to take it out because he thought maybe some people didn't understand, maybe they would be offended. And I encouraged him, I said, "John, there's not anything to be ashamed of in that paper,, all you are doing is saying, 'if you are trying a Mohammedan or Muslim don't put people on the jury wearing turbans,' any lawyer would understand in reading that what you are saying." "Well, he said, "I know, but some people might misunderstand." And I was the one that encouraged him to do .it. About that time, Time Magazine came out with a big article about him, rather derogatory, and I remember I kidded him. I said, "See, you

did what I told you and now you are world famous," and he didn't think that was very funny.

MR. CUNNINGHAM: Pass the witness.

THE COURT: Do you care to talk to [126] him, Mr. Kinne

CROSS EXAMINATION

BY MR. KINNE:

Q. Mr. Stauffer, you have already explained to us, I believe, that these papers that were presented at the District Attorneys' School did not represent policy of the office; is that correct? This paper or any of the rest of them?

A. Well, no. In other words, there's never been any effort ever made to take this manual that we had gotten together, that we had edited and put together to go with our school, there had never been any endorsement by the District Attorney. I don't think Mr. Wade ever looked at it to any extent, he certainly didn't review it before it went to press. It was done by Thomas Reprographics, whatever it is, sort of a high class xerox deal, that's how it was printed. It just had a paper cover on it until, oh,' I think it was in the fourth year that we were able to have binders, regular three-ring binders.

Q. Whether or not this was the—are you saying this was the first, in 1970 or '71, the first black person to serve on a death penalty jury, or the first black person to serve on a death penalty jury where the victim was a [127] white person?

A. And the defendant was a black person.

Q. The victim was a white person and the defendant was a black person, all those things combined?

A. In other words, I don't think there had been any death penalty case tried in the State of Texas prior to, this Blitz Bandit case—I'm sorry I don't remember the name of the defendant—wherein the victim was a white person and the accused citizen was a black person, trying it for the death

penalty, where a black was on the jury. That's my understanding.

Q. You are not saying that case in 1970 or '71 was the first time that a black person served on a death penalty jury in the State of Texas or Dallas County?

A. No, I'm not saying that.

Q. All those things combined, okay. I take it then since you have—did you select the jury in that case?

A. Yes, I did. I had two people helping me; Winfield Scott was second chair, third chair was Don Driscoll.

Q. I take it then, since you selected a black man to sit on that particular jury and you were an Assistant district Attorney working for Henry Wade, that it was not the policy of the District attorney's office to exclude [128] black people from death penalty juries simply because of their race?

A. That's right.

Q. As a matter of fact—

A. Nobody ever said anything to me about it upstairs, and I didn't—you know, when the jury was selected and all. I think the black man was the second juror -that we selected and we still had ten to go, but I never, ever during the balance of jury selection, or throughout the trial, or any time ever, had anybody say anything to me from Mr. Wade on down through the hierarchy about my doing that.

Q. Then, is it your understanding that as long as you were with the District Attorney's office it was never the policy of the District Attorney's office to systematically exclude anybody, black, Mexican, Oriental from a jury simply because of their race?

A. That's right. We did take into consideration any possible sympathy that a potential juror might have for the accused citizen. In other words, if we were trying a black person we, particularly if the victim was a white person—I am not talking about a death penalty trial but any trial—we worried that perhaps the black jurors might find the accused citizen guilty but might be lenient on penalty. This would

worry us sometimes, just as if you [129] were trying a woman you might not put other women on the jury, or something like that.

Q. As a matter of fact, a careful reading of the article written by Mr. Sparling on the front page says, an I quote, "The outline does—referring to this paper—however, contain one prosecutor's ideas on some things that need to be said to the panel and some things to look for in a juror." Is that correct?

A. That's correct. In other words, we encourage these people, or asked these people to take part in this school. We had about thirty-five different subjects that we wanted covered; everything from examining hearings, examining trials to putting on a different type of case, putting on a robbery case, putting on a burglary case, theft case, and so on. We invited people not just from the Dallas County District Attorney's office, but we had a number of people from Harris County who participated, who came up here and took certain topics and prepared their paper to go with it at my request. I know we got ready to go to press a few times and there would always be somebody who didn't have his paper in. We would have to burn a fire under him to get it done, but none of those people were in any way forced or put in a box as to what they could teach, say or write. We were glad and grateful for their time because we couldn't pay them anything for it. We didn't [130] have a way to reimburse people from Harris County for their travel up here.

MR. KINNE: Thank you, John. That's all we have.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. Mr. Stauffer, initially when John Sparling wrote that handout, or article, or whatever you want to call that, it may

have been one prosecutor's opinion with respect to jury selection; is that correct?

A. That's correct.

Q. However—well, let me ask: Did any other person furnish any information with respect to jury selection in '70 or '71?

A. No, not that I know of, he was the one. You know, when we were making these assignments and trying to get somebody to take this subject or take that subject, we were able to entice him into sticking his neck out to do this and prepare the paper that went with it.

Q. After you had gotten your grant and were able to combine all of the material into a manual, that [131] Defendant's Exhibit No. 1 is the material that went in there to tell prosecutors in Dallas County a method of selecting jurors? Is that correct, sir?

A. Well, it was a paper that—to try to give them some ideas, things to think about in jury selection, you know. Jury selection is still very much an inexact science, everybody has their own ideas about it.

Q. You thought enough of it as the director to include it in the manual, so that future prosecutors would be able to look at that manual when they wanted to get some ideas about how to select a jury that was prosecution prone, they would have that material?

A. How to use their strikes, really. Really, you don't, select who you want, you just select who we don't want.

Q. That particular article continued in the manual up until '79 when your money ran out? Or '76 is when your money ran out; is that correct?

A. Right, but then the State took over. Whether his paper was still in after the State took it over or not, I don't remember. It seems to me it was. May I just say one thing on that? The reason that Sparling's paper remained in there throughout and was never changed from him to somebody else is because he stayed with the District Attorney's office

through those years. We have an awful [132] lot of turnover in the Dallas County District Attorney's office, as you know, Mr. Cunningham. A lot of times I would. have somebody lined up to talk with us, say, on how to try an armed robbery case and he would prepare his paper; and the next time we were to give the school and reprint our manual again that person would no longer be in the D.A.'s office. I would have to try to entice somebody else to take that responsibility over and revise the paper, if it needed revision.

Q. But the paper that's in your hand there was never revised from '70 or '71 through '76 when your money ran out?

A. Well, it may have been revised, but if it was, it wag revised by John Sparling.

Q. Then continued in the manual?

A. Yes. Each author had the opportunity to add to, or to subtract from, or change their paper if they wanted to. Now, an awful lot of people were lethargic about doing it and their paper would get out of date with. new law.

Q. And I believe you said it is your impression that that particular article dealing with the selection of jurors carried over in 1977 when your money ran out and it was taken over by the state?

A. Right. And when they started doing the [133] manuals they were beautiful, because they had great big binders and all kind of money. And it came out, I think, in a four-binder set, and it made me a little jealous because mine never were that pretentious.

MR. CUNNINGHAM: You are on your own time now.

THE COURT: May he be excused?

MR. CUNNINGHAM: Yes, sir.

MR. KINNE: Yes, sir.

MR. CUNNINGHAM: Your Honor, at this time we would renew our request for Steve McGonigle and Ed Timms.

THE COURT: I am going to sustain the motion of the Dallas Morning News to quash those subpoenaes. I will give you the opportunity, if you want, to make an offer of proof in that regard though, as soon as—

MR. WEST: Your Honor—

THE COURT: I am not trying to cut off argument. I think you, Mr. McElhaney, and Mr. West, made arguments earlier today. If you have anything else you want to say, I didn't intend to be abrupt with you on it. Assuming you do not, if you want to [134] make an offer of proof, I will certainly. for the purposes of making the record, let you.

(Thereupon, Defendant's Exhibits No. 4, 5 and 6 were marked for the purposes of identification.)

MR. CUNNINGHAM: Your Honor, for the purposes of this offer of proof: If Steve M-c-g-o-n-i-g-l-e and Ed Timms were called they would testify that they are staff writers for the Dallas Morning News, a newspapers published in Dallas, Dallas County, Texas. That on or about Sunday, March 9, 1986 they wrote an article jointly, the first in a series, entitled, Race Bias Pervades Jury Selection Prosecutors Routinely Bar Blacks Study Finds. That is an article that appears on page 28, and 29, and page 30. We would offer all of the materials contained in that article pertaining to the race bias which pervades in jury selection, marked Defendant's Exhibit No. 4. We offer as—we would also offer, first offer, the March 9, 1936, it is [135] marked Defendant's Exhibit No. 4. The second offer is Defendant's Exhibit No. 5, and it would be an article entitled, Jury Selection Bias Throughout Texas, a second in a series by Ed Timms and Steve McGonigle, M-c-g-o-n-i-g-l-e, beginning on page 1 and continuing over to page 10A.

The third article written by the same two staff writers, and the last in a series, was written on Tuesday, March 11, 1986,

entitled, Some States Act To Reduce Jury Selection Bias, Prosecutors Arbitrary Exclusion Of Minorities Challenged, beginning on page 1 and continuing over to page 7A. And, also, we would offer on page 6A the, Judges Plan To Judge Action To End Jury Selection Bias, written by the two same staff writers, and referring to what Judge Ed Kinkeade proposes to offer to his fellow colleagues on the Bench.

Also, If the two staff writers were called we would would have requested that they furnish us with the names of one hundred jury trials that eligible, black potential voters were called in on in the amount of four [136] hundred sixty-seven. That the number of blacks struck by prosecutors using peremptory challenges was four hundred five, and that of this number seventeen were double strikes. That the number of blacks struck by defense attorneys was sixteen, and that the total number of blacks selected for juries out of four thousand four-hundred thirty-four prospective jurors summoned was forty-six.

We would also offer as a part of this offer of proof—and I will have to get that—the cases of the State of Texas versus David Wayne McKay, a capital murder case out of Criminal District Court No. 1; the State of Texas versus Harold Joe Lane, a capital murder out of the 291st; the State of Texas versus Tommy Mann, a capital murder case out of Criminal District Court No. 1; the State of murder Texas versus John Fearance, a capital 20 case out of Criminal District Court No. 4; Jonathon Reed, a capital murder out of Criminal District Court No. 5; Danny Lee Barber, a capital murder case out of Criminal District Court No. 1; Howie Ray Robinson, out of the 204th District Court; the State of [137] Texas versus Montoya, 282nd Judicial District Court; the State of Texas versus Ronald C. Chambers, out of Criminal District Court No. 4; and the State of Texas versus James Edwin Nolan. I will have the jurors who were selected, and material pertaining to those jurors as to their race, to determine

whether or not there were any blacks that were seated, that were members of—jurors that actually sat in those eleven cases.

THE COURT: In other words, you propose to supplement your offer later on with that information?

MR. CUNNINGHAM: Yes, sir.

THE COURT: I don't mind, providing the State has a chance to meet it if they want to Okay, is that the extent of your offer of proof?

MR. CUNNINGHAM: And, Your Honor, our investigator can—we'll attempt to find out the one hundred felony cases that were used in the articles to determine—to arrive at the graph that is shown on the front page of Defendant's Exhibit No. 4, those one hundred felony trials. I would 'ask the Court to hold [138] it open because we may want to supplement it with additional information concerning other capital murder trials that have been tried in Dallas County, specifically, with the persons who were actually jurors in those cases and the race of the jurors in those cases.

THE COURT: I haven't got any problem with that unless the State does.

MR. CUNNINGHAM: I'm sorry?

THE COURT: You propose to supplement your offer with specific information about the race of these jurors in these cases if your investigation leads you to that. Is that what you are saying?

MR. CUNNINGHAM: Yes, sir.

THE COURT: I don't have any problem with that,

Mr. Cunningham. Mr. Kinne, again, I will give the State a chance, if they don't agree with your offer, we'll have a hearing on that .I suppose. Anything else in your offer of proof?

MR. CUNNINGHAM: That's all at this time, Your Honor.

THE COURT: Mr. Kinne, any objection from the State other than those already made, [139] and that is to relevancy and such as that?

MR. KINNE: Other than those? No, sir. For the purposes of this hearing, certainly, we are not about to agree that the newspapers article is probative evidence of anything.

THE COURT: Okay. Well, I accept that.

MR. CUNNINGHAM: Your Honor, that's even more reason why we ask the two staff writers be brought in, so we could have an opportunity to examine them and determine the probative nature and the validity of their article.

THE COURT: If they were allowed to testify, wouldn't the testimony be hearsay and their-opinion as opposed to factual?

MR. CUNNINGHAM: Not based upon the records, Dallas County records.

THE COURT: Which records are the best evidence of what you are trying to prove.

MR. CUNNINGHAM: They're the ones that know one hundred felony cases. If I had the list I would be able to do the rest.

THE COURT: Okay. Mr. Kinne, I noted your comment. And the Court will, of course, [140] permit that offer of proof to be made part of the record, assuming I don't grant the defendant's motion. Argument on the motions? We actually have two motions, I suppose; one to quash the jury, a second, alternatively, to select a separate one to hear punishment.

Argument? More argument I should say?

MR. CUNNINGHAM: I waive opening.

ARGUMENT ON THE MOTION

MR. KINNE: Your Honor, I believe that probably the record during jury selection amply supports this. However, for the purposes of this hearing, I would like the record to reflect that the jury in this case that was selected consists of seven white females and five males, and of that group there is one black male, there is one male of Hispanic descent, and there is one male of Filipino, hence Oriental descent. I would also like the record to reflect that during the course of voir dire examination that both the State and the Defense entered into certain agreements to excuse particular jurors. That [141] these agreements were for the most part, if not all, entered into in writing between counsel for the Defense and counsel for the State, wherein both sides agreed to exclude or to excuse from jury service in' this case six black individuals, two individuals of Hispanic origin and one oriental. We feel that the Defense has fallen far short of showing there is any systematic exclusion of any person, or persons, from this jury due to the their membership in any minority. We would urge the Court to deny the motion.

THE COURT: Thank you, Mr. Kinne.

MR. CUNNINGHAM: Your Honor, before we do it, I have another offer I totally forgot. Your Honor, I am offering as Defendant's Exhibit No. 7 the questionnaire prepared by juror No. 7, Roderick R. Bozeman, a black male struck by the State as their number one strike; the questionnaire for juror No. 9, Billy Jean Fields, a black male struck by the State as their number two strike; the questionnaire for Joe Alfred Warren, juror No. 28, a black male; Edwin L. Rand, juror No. 37, a black male struck by the State; the [142] questionnaire for juror No. 40, Carol S. Boggess, struck by the State; Wayman Kennedy—Wayman A. Kennedy, juror No. 43, struck by the State; juror No. 71, Linda C. Baker, struck by the State, a black female; Janice Mackey, a black female,-juror No. 100, struck by the State; juror No. 102, Paul Bailey, a black male struck by the State; and Anna L. Keaton, juror No. 105, a

black female struck by the State. We offer in evidence those seven questionnaires of ten of the State's fourteen strikes in this case.

THE COURT: Juror Keaton was not a black person.

MR. CUNNINGHAM: Uh-huh.

THE COURT: Okay.

MR. CUNNINGHAM: Yes, sir.

THE COURT: That's fine, I just had it noted different on my sheet. Okay, those will be made a part of the record.

MR. CUNNINGHAM: Your Honor, also for the purpose of it record, Mr. Kinne indicated that we had excused six or seven others by agreement. Juror No. 17 was Hilbert Gitchoway, a black male juror; No. 30, Dora [143] May Randle, a black female; Jerry—juror No. 61, Jerry W. Mosley, was a black male. And that those were the only three blacks that were agreed to be excused by the parties.

MR. NELSON: Judge, we are going to the State will object to that as being incorrect. I think the record, and the Court's records, reflect that Vergie Miller, juror No. 50, was excused by agreement. No. 51, Evangelina Sustaita—I am not sure how you pronounce that—was excused by agreement. No. 56 was excused by agreement. I believe Mr. Cunningham named Mosley. Lourice Collier was excused by agreement, juror No. 67; Johnny Terry, juror No. 80; and Helen. Reyes, juror No. 84, were also excused by agreement of both parties.

THE COURT: Well, of course, the record i in voir dire, which is the official record, will reflect what was done. The court has the written agreements in the file on many of the jurors who were excused by agreement. And I assume, and the record again will have to bethe final arbiter on this, will reflect there were a few jurors who were excused after being [144] voir dired for a while for one reason or another. I don't know if we secured written agreements. Because there were

situations where the juror had physical problems, or something of that sort, and were excused as a result of the parties agreeing ahead of-time. So, I will let the record reflect who was excused for what purpose.

MR. KINNE: Your Honor, we further object to the, I guess it is Defendant's Exhibit No. 7, all of the questionnaires, in that these questionnaires appear to contain handwriting which is not the handwriting of the juror but apparently some handwriting put on there by the Defense. We have no objection to the questionnaire as filled out by the juror, but we'll object to whoever wrote the rest of this material that's written on these questionnaires.

MR. NELSON: Am I not correct; the Court. put the original questionnaires in the Court's record as to each of these jurors?

THE COURT: I understand from the court reporter that she was accumulating them out of her set of copies.

[145] MR. NELSON: we would simply ask, since those have not been written on or have any type of marks, other than by the jurors, thos[e]' be included in the record rather than Mr. Cunningham's copies.

MR. CUNNINGHAM: I have no problems with that as long as the court reporter knows which ones, and the numbers, and that they in turn will be marked Defendant's Exhibit 7.

THE COURT: I think even the Court marked his own copies for one reason or another, for personal observation. That might not be appropriate. Anything else, Mr. Cunningham?

MR. CUNNINGHAM: That's all, Your Honor.

THE COURT: Do you have any argument then in re sponse to the .State's argument?

MR. CUNNINGHAM: I think the record is clear-that systematic exclusion of blacks is evident.

THE COURT: I appreciate the brevity of that argument.

MR. CUNNINGHAM: John took up all my [146] time.

THE COURT: Mr. Cunningham, Mr. West, the State, the Court is going to deny both of these motions, not necessarily make specific findings of fact. The evidence I heard today makes me conclude, based on the testimony of these various witnesses, that the exercise of peremptory challenges in the District Attorney's office in Dallas County over a period of time has been for a variety of reasons; personal, subjective, and sometimes even emotional reasons. And that I had no evidence presented to me that indicated any systematic exclusion of blacks as a matter of policy by the District Attorney's office; while it may have been done by individual prosecutors in individual cases. And I believe from the evidence I have heard, coupled with the current status of the law as I understand it, the Supreme Court cases including the Swaim, S-w-a-i-m, case and case out of Missouri that slips my mind momentarily—Grigsby versus Marberry, plus the other cases, convince me that I am following the law in [147] this regard. So, I have denied both motions.

MR. CUNNINGHAM: Your Honor, would we have the right, in case the Supreme Court decides, well, renders an opinion in Grigsby versus Marberry before we complete this trial, to possibly supplement it with what the Supreme Court says in that case; since it has already been argued and they are presently getting ready to decide?

THE COURT: Has it been argued?

MR. CUNNINGHAM: They have argued it.

THE COURT: I will say this: Any time the Supreme Court decides to change the law I am going to at least read it.

MR. CUNNINGHAM: I will tell them to ship me a copy if it is within the next ten days. Note our exception to the Court's ruling with respect to the motion with respect to the systematic denial of minorities on juries, and also the—did I understand the Court-to deny us a separate jury on punishment?

THE COURT: Right.

MR. CUNNINGHAM: Under Grigsby versus Marberry.

[148] THE COURT: At this point, unless the Supreme Court of The United States decides different, our statutes don't provide for it.

MR. CUNNINGHAM: If the Supreme Court affirms Grigsby versus Marberry what would the Court propose doing then?

THE COURT: I suppose give the defendant a new trial, if he's been convicted, because—

MR. CUNNINGHAM: Note our exception to both rulings, Your Honor.

THE COURT: Perhaps the State would answer that. Are we ready to go forward on the other motions?

MR. CUNNINGHAM: I will be in just a moment.

THE COURT: Mr. Cunningham, you had a couple of other motions to have me at least think about. Do you want to urge—

MR. CUNNINGHAM: Your Honor, we have a Motion To Sequester The Jury. We would ask that the jury be sequestered from the date that the Court brings them in to first start hearing testimony.

THE COURT: I am going to deny that at

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NEWS

A PATTERN OF EXCLUSION Blacks rejected from juries in capital cases

Series:

DISCRIMINATION IN JURIES

Ed Timms, Steve McGonigle

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For all 15 men tried for capital murder in Dallas County since 1980, prosecutors got what they wanted: the death penalty and overwhelmingly white juries.

Of the 180 Dallas jurors who condemned those men, only five were black. There were 57 other blacks legally qualified to serve on the juries, but prosecutors barred 56.

The prosecutors' use of peremptory challenges—dismissing potential jurors without having to give a reason—meant that nine of every 10 blacks qualified for the capital murder juries were excluded. That pattern of racial bias, widespread throughout Texas, is described by one black former prosecutor as "the most dangerous kind of discrimination, because it is oftentimes camouflaged with legal cliches."

Prosecutors say blacks routinely are excluded from juries because many are soft on defendants, perhaps as a result of their historical distrust of the criminal justice system.

Such exclusion in Dallas County meant that four of the five blacks sent to death row were tried by all-white juries. Two of those, in fact, Larry Smith and Michael Wayne Evans, were executed by lethal injection this year after twice being tried and convicted by all-white juries.

The only black allowed to pass judgment against another black was one who told prosecutors that Texas' form of execution—lethal injection—was too humane. "It's too quick,' he testified. "They don't feel the pain."

These are among the findings of an ongoing investigation by The Dallas Morning News examining jury selection in Dallas and 14 other Texas counties. The analysis included a review of the records of 133 of 232 inmates on death row as of Aug. 1.

The 15 counties, which accounted for almost 60 percent of inmates on death row, represented major geographic regions and included the five largest metropolitan areas in the state. In counties whose black population amounted to at least 10 percent, the investigation also found evidence of racial discrimination in jury selection.

In Dallas County capital murder cases since 1980, blacks had a 1-in-12 chance of being selected as jurors, compared to a 1-in-3 chance for whites and a 1-in-4 chance for Hispanics.

Capital cases, which carry mandatory life sentences or the death penalty, are limited to murders of law enforcement officers or slayings committed in the course of certain other felonies, including robbery, rape and kidnapping.

Several legal experts and community leaders say t he findings show that peremptory challenges are being used by prosecutors as tools of discrimination against defendants facing the most visceral decision of criminal justice—execution.

Frank Williams, criminologist with the Criminal Justice Center at Sam Houston State University in Huntsville, analyzed The News' findings. The probability that blacks were eliminated by chance is "1-in-10,000," he said.

State District Judge Larry Baraka, Dallas' first black felony prosecutor, said The News' findings reaffirm his conclusion

that race is the primary reason prosecutors use peremptory challenges to bar blacks.

"Knowing Dallas County and knowing the DAs' practices, I know that's what they're doing."

Jack Boger, assistant counsel for the NAACP Legal Defense Fund, said the findings establish a pattern:

"The minority community is being told that it doesn't count as much in the criminal justice system. . . . They certainly don't count as jurors and they're being told they need not apply, or if they apply, they will not be, in effect, hired as jurors."

In a series of articles published last March, The News documented virtually the same pattern of discrimination in 100 randomly selected felony trials in Dallas County.

In April, a landmark U.S. Supreme Court decision, *Batson v. Kentucky*, prohibited the use of peremptory challenges in a racially discriminatory manner, saying such practices undermined "public confidence of our system of justice." In a concurring opinion, Supreme Court Justice Thurgood Marshall cited The News' findings as an example of "systematic exclusion" that violated the 14th Amendment guarantee of due process under the law.

Henry Wade, Dallas County's district attorney for 36 years, said he did not know the specific reasons his prosecutors excluded blacks in capital cases. Wade speculated these blacks were not seated as jurors because prosecutors believed them to be sympathetic toward defendants.

Wade said his office has tried to impanel more blacks on juries in the past five to 10 years. "But I don't believe in putting someone on there just because he's black," Wade said. "I want someone on there who's going to vote for the state."

Assistant District Attorney Norman Kinne, who has tried 11 capital cases, more than any other prosecutor on Wade's staff, suggested that most blacks were excluded because they expressed reservations about the death penalty.

Kinne said prosecutors have not intentionally selected all-white juries. "It's just the way things fell," he said.

While The News' analysis revealed a pattern of prosecutors barring blacks, blacks themselves also shoulder some of the responsibility for the prevalence of all-white juries in capital cases.

Potential jurors in capital cases are screened individually by both prosecutors and defense attorneys. If during the questioning, they state they cannot be impartial, the judge dismisses them for "cause." After screening, each side has 15 peremptory strikes that allows it to cut potential jurors without explanation. The first 12 remaining are impaneled as jurors.

In Dallas County, blacks are three times more likely than whites to be excused for cause after saying they cannot assess the death penalty, The News' inquiry showed.

In Harris County, only 8 percent of the jurors in capital cases were black. But blacks there were more likely to hear the cases of other blacks; 65 percent of black defendants had at least one peer on his jury, by far the highest percentage among the 15 counties examined by The News.

Almost 80 percent of the black inmates on death row from the remaining 14 counties faced all-white juries.

"Never in the history of the state of Texas has a white person been sent to death by an all-black jury," said Harris County Justice of the Peace Al Green, president-elect of the Houston branch of the NAACP. "It has never been done. . . . Somehow we've come to accept the notion that it's all right for a black defendant to be put to death by an all-white jury."

John Fearance and Ronald Curtis "Buffalo" Chambers are two of the three surviving black inmates on death row from Dallas County. Counting retrials, both have been tried and convicted twice by all-white juries.

"There's no justice to it," Fearance said from behind a heavy mesh screen at the Texas Department of Correction's Ellis I Unit near Huntsville. Fearance was convicted of the 1978 stabbing death of an East Dallas man while burglarizing his house.

"They have their mind made up," he said. "They've already tried you before they've actually tried you."

Chambers, on death row for the 1975 slaying of a Texas Tech University student during an abduction-robbery, said prosecutors didn't want to take a chance at justice.

You're sitting there and you start seeing only white people going on the jury, right? Well if you're a black dude, and you see all these white people that are going to be on your jury—the judge, too—you want somebody who can under stand you."

Houston lawyer Percy Foreman has, by his own estimation, tried more death penalty cases than anyone. He believes that, given the same evidence, a black is more likely to be sentenced to death than a white.

The reason, Foreman asserts: "Racial prejudice on the part of the jurors."

Beaumont lawyer Gaylyn Leon Cooper, the first black felony prosecutor in Jefferson County, believes black jurors mitigate racist impulses.

The black juror won't go in and say, "Well, you know how these people are," or "I'm afraid of these people," Cooper said.

Minority representation on capital murder juries also is seen as a way to ensure that mitigating circumstances are at least considered.

"If you're in a death penalty case and you've got a black kid who grew up . . . in the ghetto, and was fatherless, and you've got 12 middle-class, white jurors, you've got nobody on that jury who by definition can identify with your client," said Dennis Boskey, former legal director of Southern Poverty Law Center in Montgomery, Ala.

State Sen. Craig Washington, a Houston defense lawyer, said the secret deliberations of 12 white jurors sends a negative message to the minority community.

"If I'm outside the door when the decisions are being made, I'm suspicious of the decision," Washington said. "If you're being fundamentally fair and your decision is right, then you shouldn't mind me watching it being made."

The Rev. Zan Holmes, pastor of Dallas' St. Luke Community Methodist Church and a former Texas legislator, said blacks more often are crime victims than whites. "Blacks have a lot at stake in the criminal justice system and want to see justice done."

For more than 20 years, the same U.S. Supreme Court decision that condemned the use of peremptory challenges "to deny the Negro the same right to participate in the administration of justice," in practice gave prosecutors free rein.

Defense lawyers complained that *Swain v. Alabama* demanded an unattainable standard of proof; the ruling permitted the use of peremptory challenges in individual cases, and required documentation of system-wide discrimination.

But under the guidelines of the Batson decision in April, if a defense lawyer shows evidence of "purposeful racial

discrimination" during a single trial, prosecutors can be compelled to prove they didn't use their peremptory challenges solely to exclude blacks.

The debate now centers on the application of Batson in actual courtroom situations. Prosecutors say it contradicts the traditional intent, which allowed a person to be excused without explanation.

Defense attorneys contend the ruling can easily be circumvented.

"A lot of time is going to be wasted because the prosecutor can always come up with some other reason that would appear equally valid," explained Houston lawyer Donald W. Rogers Jr.

There is a wide gap between knowing peremptory challenges are being used racially and proving it, according to John Paul Davis, Jefferson County's first black prosecutor and now a municipal judge in Beaumont.

"The subtleties of discrimination within the criminal justice system are the most dangerous kind of discrimination, because it is often times camouflaged with legal cliches," he said. "Lawyers can always use one word when they want to use another."

However many lawyers believe Batson can be used to curb prosecutors' use of peremptories along racial lines.

"A good, articulate prosecutor who actually chooses (jurors) on methods other than race will have no problem with Batson," said Dallas lawyer Richard Alan Anderson. "If you've got a prosecutor who's obviously choosing on a racial basis and is just trying to make excuses to justify that . . . then you're going to catch those folks."

University of Iowa law professor David C. Baldus, a nationally known expert in capital murder trials, suggests that

lessons learned in job discrimination suits might be applied to jury selection.

In those cases, employers have been found liable for rejecting minority job applicants whose lawyers proved they had the same characteristics as whites who were hired.

Prosecutors who have been successful after picking all—white juries are not likely to change their formula. And that formula, many defense lawyers claim, was etched in an era of segregation and passed blindly to a new, more enlightened generation that nevertheless is practicing age-old discrimination.

"The practice that's been going on in that courthouse ever since I've been involved in it—as both a prosecutor and a defense attorney—is that you just don't question success," said Brad Lollar, president-elect of the Dallas County Criminal Bar. "They've been picking their juries that way forever . . . and it's always worked."

Lollar, a Dallas County prosecutor for four years before going into private practice, said no one "necessarily . . . came up to me and said directly, "Don't take a black on a jury." It wasn't that obvious.

"What we were-told to do was go around and watch how the experienced prosecutors did things. And it didn't take a Rhodes scholar to figure out that one thing they were all doing was excluding minorities from the jury."

For Houston lawyer James Stafford, who has appealed the selection of an all—white jury in a capital murder case, the irony is that many blacks eliminated are "probably a lot stronger state's jurors than some of the white people."

While The News' study showed a higher percentage of blacks on Harris County capital murder juries than on Dallas juries—8 percent versus 3 percent—prosecutors there

nonetheless used peremptory challenges to strike more than 90 percent of the black potential jurors.

Harris County District Attorney Johnny Holmes said his prosecutors do not use peremptory challenges solely because of race, but added: "I don't know if we can divorce race from individual philosophies of the potential juror."

Holmes argues that many blacks perceive the judicial system still tainted by historical experiences of racial prejudice and injustice.

"I still get a rap sheet every now and then on a black defendant and somwhere earlier in his arrest career, it shows "black man walking in a white neighborhood." Now, when you have been subjected to that, or you know people who have, or your family members have . . . it makes one a little bit skeptical of the system."

And that skepticism, Holmes said, might be reflected in "some type of turn-the-other-cheek punishment" for a capital murder defendant.

Houston lawyer Carolyn Garcia, who has handled the appeals of several death row inmates, disagrees. She points out that blacks who are removed with peremptory challenges already have sworn they can follow the law. And she fears that the exclusion of blacks from juries is creating yet another disenfranchised generation.

"You can never get off the treadmill of negative experiences, she said. "The only way to break that cycle is to invite those people into that system."

Dennis Boskey, a Montgomery, Ala., lawyer who specialized in capital murder cases, described Holmes, position as a form of double jeopardy.

You're saying, "Well, we beat you over the head then and now we're going to kick you off the juries because we beat you back then," Boskey said.

The search for the ideal juror frequently leads prosecutors and defense lawyers along different routes. They look at a disparate assortment of intangibles to guide them, from how a potential juror looks and how much money he makes to the kinds of books he reads.

"You want a guy with roots in the community," explained Kinne, who teaches other Dallas County prosecutors how to select juries in capital murder cases. "Usually he has some sort of responsible position that he's held for a number of years. None of his close family or friends has been involved in crime or spent time in the penitentiary. He has a basic understanding of the law . . . and doesn't have any disagreement with any of the law."

Dallas defense attorney Mike Byck, who defended Chambers and two others on capital murder charges, says each side has its own criteria for jurors.

"The district attorneys want a bunch of jack-booted, marching fascists to sit on a capital murder jury," Byck said. "I want a bunch of yuppie, knee-jerk, no-backbone liberals to sit on my jury because I don't want them to kill my man. They want them to kill the guy."

Jurors on Texas capital cases once were required to swear that the potential outcome—either death or life imprisonment—would not affect their deliberations. Those who could not were excused from jury duty for cause.

But in 1980, the U.S. Supreme Court ruled that only individuals who say they cannot assess the death penalty under under any circumstances can be excused for cause. The case, *Adams v. Texas*, involved a Dallas County defendant tried for killing a police officer.

In Adams, Supreme Court justices concluded: "To exclude all jurors (for cause) who would be in the slightest way affected by the prospect of the death penalty . . . would be to

deprive the defendant of the impartial jury to which he or she is entitled under the law."

Some legal scholars, as well as Supreme Court Justices William Brennan and Thurgood Marshall, claim prosecutors are abusing the same constitutional rights protected in Adams.

Brennan, in a recent dissenting opinion, wrote that using peremptory challenges to exclude everyone with reservations about capital punishment creates a "hanging jury."

Many blacks in Dallas express some reservations about the death penalty, yet are kept in the jury pool after saying they could assess death in some circumstances. Kinne said those potential jurors are the ones prosecutors are told to strike with peremptory challenges.

"We teach (prosecutors) that if someone expresses doubts about his ability to follow the law, then you get rid of him,' Kinne said. "If it turns out that they're black, that's just how it falls."

Dallas lawyer Royce West, a black former prosecutor and recent Democratic candidate for district attorney, said he doubts Kinne's explanation of why blacks have been excludedDistrict Attorney Jon Sparling emphasized that minorities "almost always empathize with the accused" and do not make good jurors.

That perception, says defense lawyer Byck, is evident today in prosecutors' jury selection in capital cases.

"I get the impression that they use a racial stereotype much the same, and literally it almost comes out of the Jon Sparling manual where blacks! Jews, well-educated women are too sensitive, too equivocating, too whatever to put on a capital murder jury," Byck said.

Gaynelle Jones, a black Harris County felony prosecutor, said eliminating people who aren't likely to be receptive to

the prosecutor's case—regardless of their race—is just common sense.

"I just can't see myself stacking the cards against me," said Ms. Jones.

Said John Paul Davis, the Jefferson County municipal judge: "I do believe to some extent blacks tend to be more inclined not to be spoonfed by the prosecution. They tend to be a little more independent. . . . In fact, I think that makes them more valuable on a jury."

Davis said that while blacks are chosen for some juries, they are "habitually excluded from juries when blacks are defendants, which smacks of the fiercest kind of racism."

Of the four death row cases from Jefferson County examined by The News, one inmate is white, the others black. The News' analysis showed that one black juror was impaneled in the white defendant's trial; the three blacks were sentenced to death by all-white juries.

"We look at who will enforce the law as we see it, and who won't,' said Jefferson County District Attorney James S. McGrath. "More blacks, through my experience, would be against, or weaker on, the death penalty than other groups. We may be influenced to that extent."

However, McGrath said, his prosecutors never have "systematically excluded" any ethnic or racial group.

"We're cognizant of the fact that. certain groups of people make the best jurors," he said. "If you want a fine jury, get yourself 12 Germans on there, and you're going to fly. Statistically, German people are more strict in law enforcement than any group that we know of." Beaumont lawyer Cooper, a former assistant on McGrath's staff, said he was never told not to let blacks on a jury, but felt some pressure.

"Any time a jury came back with what was less than considered to be the appropriate punishment from a prosecutorial point of view, then a reason had to be attached," he said. "And I might be asked, "How many blacks were on the jury?"

John Vance, who will succeed Wade Jan. 1 as Dallas County district attorney, said he intends to record the race of each prospective juror in felony trials, and will personally question any prosecutor whose use of peremptory challenges appears to be racially motivated.

In Tarrant County, a written policy prohibits the systematic exclusion of minorities from juries. Juries that convicted four to death row were examined by The News—three were all-white, the fourth, which convicted a black defendant, included one black juror.

Tarrant County District Attorney Tim Curry said many minorities are "weak on capital punishment' and excused with peremptory challenges for that reason.

Dallas lawyer Mel Bruder, who represented Randall Dale Adams, the defendant in Adams, notes that peremptories also eliminate individuals who won't be fair to the defendant, and warns against too vigorous an attack on their use.

"If you don't like them because they're being used in some discriminatory manner, then they'll have to be abolished," Bruder said. "And I think that would be a greater disservice to the defendants than having them, and allowing the state to strike people who are . . . weak."

Prosecutors argue that their first responsibility is to get a conviction and find the jurors who will give it to them.

Troy Woods was the only black juror in the 15 Dallas County capital murder trials involving a black defendant. His views on the death penalty were unwavering during jury selection.

"What I call punishment is back to the old Indian days," he said. "Pour some honey on them and stake them out over an antbed. . . . That's what I call punishment."

Woods, 46, was a juror in the trial of Thomas Joe Miller-El, who was sentenced to death in March for the robbery-murder of an Irving motel clerk.

By the time a trial begins, said Holmes, the Houston district attorney, "We've resolved any doubt about the guilt of the accused in our hearts—this is a guilty son of a bitch and we're trying to find somebody who's going to put him in the pen."

Sammie Lee Parker was one of four blacks whose opposition to the death penalty kept him from serving on the all-white Dallas jury in 1985 that tried Ronald Curtis Chambers and sentenced him to death.

"I guess the main reason that I'm against the death penalty . . . is maybe 80 or 90 percent of the time there is a black man involved," Parker testified.

"I am not defending them, because I know we do wrong like everybody, but I think the black man normally gets the tail end of (the) deal."

Parker's view is shared by many who claim that blacks historically have received harsher treatment from a jury system that has excluded them.

For that reason, many blacks mistrust the legal system. Almost half the blacks summoned for jury service in Dallas County were excluded by the judge because of their stated opposition to the death penalty.

"Minorities correctly realize . . . that they have little chance at the courthouse, or at least that they're running behind," said Corpus Christi lawyer Doug Tinker, an authority on jury selection in capital trials. "They go down there and they're

scared to death. They're like a rabbit in the headlights of a car."

George C. Wright, director of Afro-American studies at the University of Texas, believes blacks and whites see the law differently: "The whites see the law as the protectors. Black people see it as the oppressor."

In 1924, when Texas began using the electric chair for executions, the first four inmates seated—all in one night—were black. From 1924 through 1964, 504 defendants were sentenced to death; 63 percent of the 361 defendants actually executed were black.

The last to die in the Texas electric chair—on July 30, 1964—was 27-year-old Joseph Johnson Jr., a Houston black convicted of murder.

Because of several factors, executions in Texas were interrupted from 1964 to 1981: anticipation of a U.S. Supreme Court ruling on the constitutionality of the death penalty; a sweeping 1972 Supreme Court decision that overturned potentially discriminatory state laws; and appeals that tested Texas' capital punishment law passed in 1973.

On Dec. 7, 1982, in Huntsville, Charlie Brooks Jr., a Fort Worth black convicted of killing a car dealer, became the first inmate to be executed by lethal injection in the nation.

Fort Worth lawyer Danny Burns unsuccessfully appealed Brooks' conviction, arguing that the Texas death penalty was "a disproportionately severe and excessive punishment . . . being imposed pursuant to a pattern of racial, economic, and sexual discrimination."

Statewide application of the death penalty echoes the pattern in Dallas County. Since 1924, 17 whites and 40 blacks from Dallas County have been executed.

Five whites and 17 blacks from Dallas County have been executed during Wade's tenure as district attorney. Ten of the

blacks were executed before 1964 for what are no longer capital offenses—nine for rape and one for robbery with a firearm.

Gerald Goldstein, general counsel for the Texas Civil Liberties Union, said the attitude among many blacks against the death penalty should surprise no one.

"It should come as no shock to us any more than if we went to Spain after the Inquisition and could find the few Jews left and ask them what they thought," Goldstein said. "I imagine they would have some problems with the system at that point."

Houston lawyer Ron Mock, a black, believes the solution to a cycle of skepticism—one that makes blacks distrust the system and the system mistrust them—can't be written in the law.

"My changes would involve . . . the hearts and minds of people as a whole to see each other as a brother as equal folks under the law," he said.

"Those are the things you'd have to change. You'd have to change ordinary people. That's the problem."

TABULAR OR GRAPHIC MATERIAL SET FORTH IN THIS DOCUMENT IS NOT DISPLAYABLE

1. GRAPH (Credit: DMN * Source:DMN) DEATH PENALTY CASES:

RACIAL MAKEUP OF JURIES BY COUNTY 2. CHART (No credit given) RACIAL COMPLEXION OF DEATH ROW INMATES, JURIES 3. PHOTO (Credit:DMN-Jan Sonnenmair) John Fearance looks out of a cage that "dangerous" inmates are kept in during interviews. 4. PHOTO (Credit:DMN-Jan Sonnenmair) Clarence Brandley is on death row after an all-white jury in Conroe convicted him of killing a white girl. 5. GRAPH (Credit/Source:DMN) FEW BLACKS

SELECTED FOR DALLAS DEATH PENALTY TRIALS 6. GRAPH (Credit /Source: DMN) POTENTIAL DALLAS DEATH PENALTY CASE JURORS EXCUSED FOR CAUSE 7. PHOTO (Credit:DMN-Jan Sonnenmair This Photo ran in the BULLDOG Edition ONLY) Calvin Williams, a Houston man on death row, was convicted by an all-white jury. 8.GRAPH (Credit/ Source: DMN * This Graph ran in the BULLDOG Edition ONLY) CHANCES OF SERVING IN DALLAS DEATH PENALTY TRIALS, BY RACE ; LOCATION: Graphs—NR. Photos: 1.—2. Oversize Black/White File. 3. Prisons & Prisoners—Texas.

COURT OF CRIMINAL APPEALS OF TEXAS, *EN BANE*.

No. 69677

THOMAS JOE MILLER-EL,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

March 3, 1988.
Rehearing Denied April 27, 1988.

OPINION

W.C. DAVIS, *Judge*.

Thomas Joe Miller-El, hereinafter referred to as appellant, was convicted by a jury of intentionally causing the death of Douglas Walker while in the course of committing the underlying offense of robbery, which elevated the offense of murder to capital murder. *See* V.T.C.A., Penal Code, § 19.03(a)(2). After the jury answered the two special issues in the affirmative, the trial judge assessed appellant's punishment at death. V.A.C.C.P., Art. 37.071.

In his brief appellant asserts thirty-six points of error. In his first seven points of error, appellant contends that the prosecutor's use of ten of fourteen peremptory challenges to exclude black veniremen from sitting as jurors in this case violated his right under the Sixth Amendment to a jury drawn from a cross section of the community. We shall abate the appeal and remand to the trial court for a hearing under the

auspices of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

The record reflects that during voir dire, the prosecutors exercised fourteen of the allowed fifteen peremptory challenges. Ten of the fourteen challenges were used to exclude black veniremen from sitting as jurors. Only eleven members of the black race were on the venire panel. In the end, one black juror was seated. Appellant is a member of the same race as the ten excluded veniremen. Appellant contends that the conduct of the prosecutors, in excluding the ten black veniremen, violated his constitutional rights guaranteed by the Sixth Amendment and the Equal Protection Clause of the Fourteenth Amendment to a jury drawn from a cross section of the community. Appellant asserts that the prosecutor's use of the peremptory challenges to exclude the ten black veniremen clearly established a purposeful or deliberate denial to blacks to participate as jurors in his case.

Prior to the individual voir dire of the veniremen, appellant filed a Motion To Quash The Indictment because of the exclusion of blacks from the jury panel. After the hearing, the trial court refused to quash the indictment. In this cause, it can be argued that appellant had a *Batson*, *supra*, hearing on his motion to quash the jury that heard his case. However, given the fact that *Batson*, *supra*, was not decided until after the case at bar had been tried to completion in the trial court, and given the testimony that transpired at the hearing, we believe such an argument would border on being specious.

We find that on the facts of this case, appellant sufficiently raised the issue of the State's use of its peremptory strikes at trial to invoke *Batson*, *supra*, protections on appeal. Cf. *DeBlanc v. State*, 732 S.W.2d 640 (Tex. Cr. App.1987).

In *Batson*, *supra*, the Supreme Court reiterated its observation that the State's purposeful or deliberate denial of jury participation to black persons because of race violated a

defendant's rights under the Equal Protection Clause of the United States Constitution. It then found that the State could not challenge potential jurors solely on account of their race.

In order to invoke the protections set forth in *Batson*, *supra*, a defendant must establish purposeful discrimination by showing that:

1. he was a member of a cognizable racial group;
2. the prosecutor had exercised peremptory challenges to remove from the venire members of the defendant's race (peremptory challenges constitute a jury selection practice which permits those to discriminate who are of a mind to discriminate); and
3. the facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude the veniremen on account of their race.

106 S.Ct. at 1723

If the defendant raises an inference of purposeful discrimination through the State's use of its peremptory strikes, the burden shifts to the prosecutor who must come forward with a neutral explanation for the challenges. The trial court must then determine whether despite the State's explanation, the defendant has established purposeful discrimination. The Supreme Court in *Batson*, *supra*, stressed that not just any explanation would do, and in fact some explanations would per se not be sufficient. *Batson*, *supra*, 106 S. Ct.1722,1723. By largely judging credibility of the prosecutor, as well as content of the explanation, the trial judge must make a finding of fact concerning purposeful discrimination which should be given great deference by a reviewing court. *Batson*, *supra*, n. 21.

In the instant case, appellant clearly objected to the prosecutor's use of peremptory strikes. After the hearing to

quash the indictment, the trial court overruled the appellant's motion on the jury selection issues by noting that the appellant failed to demonstrate systematic exclusion of black veniremen by the Dallas County District Attorney's Office.

We find that appellant has established an inference as required by the *Batson* court. First, he is a member of the black race. Second, the prosecutor exercised ten of fourteen peremptory challenges to exclude members of appellant's race. Finally, in using such a skewed number of strikes on the black veniremen, ten of the eleven prospective black jurors were peremptorily struck, with only a single black juror seated on the panel. However, it is not for this Court to say whether there was racial motivation in the prosecutor's actions. *Batson*, *supra*, requires that such a determination be made by the trial judge.

Because the trial court did not have the benefit of the Supreme Court's opinion in *Batson*, we feel it is now appropriate to remand the case so that the trial court may have the opportunity to consider first whether appellant had made a prima facie showing of discrimination, and then if so, whether the State had a neutral explanation for the strikes. If the State is unable to explain properly its use of peremptory strikes on minority members of the prospective jury panel such that the trial court concludes that purposeful discrimination was the sole motivating factor behind any of the State's strikes, then the trial court should enter this finding in his findings of fact and conclusions of law. Such findings of fact and conclusions of law shall be forwarded to this Court for review.

DeBlanc, *supra* at 642.

This appeal is hereby abated with instructions to the trial court to conduct further proceedings not inconsistent with this opinion and *Batson*. The trial court shall forward the record of those proceedings and findings of fact and conclusions of

law to this Court. *DeBlanc*, *supra* at 642. *Henry v. State*, 729 S. W.2d 732 (Tex. Cr. App.1987); *Keeton v. State*, 724 S.W.2d 58 (Tex.Cr.App.1986).

It is so ordered.

ORDER ON REHEARING

MILLER, Judge.

The State's Motion for Leave to File a Motion For Rehearing is denied.

This appeal is abated to the trial court with instructions that it conduct a hearing pursuant to the full procedure and steps outlined in *Keeton v. State*, 749 S.W.2d 861 (Tex.Cr.App. 1988) (opinion following abatement).

IT IS SO ORDERED.

IN CRIMINAL DISTRICT COURT VERSUS NO. 5
DALLAS COUNTY, TEXAS
APRIL TERM, A.D., 1988

[Filed June 29, 1989]

NO. F85—7 866 8—NL

THE STATE OF TEXAS

VERSUS

THOMAS JOE MILLER—EL

* * * * * * * * * * * * * * *

HEARING
VOLUME I OF I VOLUME

* * * * * * * * * * * * * * *

APPEARANCES

HON. JOHN VANCE
Criminal District Attorney Dallas County, Texas
BY: HON. JEFF KECK and
MS. SHARON BATJER
Assistant District Attorneys
APPEARING FOR THE STATE

HON, ROYCE WEST
and
HON. BRUCE CUNNINGHAM
Attorneys at Law Dallas, Texas
APPEARING FOR THE DEFENDANT

BE IT REMEMBERED, to—wit: That on the 10th day of May, A.D., 1988, the above styled and numbered cause came on to be heard before The Honorable Pat McDowell, Judge of Criminal District Court No. 5 of Dallas County, Texas, and the following is a true, correct and complete transcript of all the proceedings had:

[3] PROCEEDINGS

THE COURT: Let me call, for the record, F8578668—NL, The State of Texas versus Thomas Joe Miller—E1. Let the record reflect these events: This case is a case in which the jury, having answered affirmatively to special issues after the Defendant was found guilty of the offense of capital murder —his case has been appealed to the Court of Criminal Appeals, State of Texas. I understand that briefs have been submitted and oral argument has been made. The Court of Criminal Appeals ordered this trial court to conduct a hearing which I will characterize as a Batson hearing. That is the purpose and thrust of this hearing this morning.

Are both sides ready on that?

MR. KECK: The State is ready, Your Honor.

MR. CUNNINGHAM: The defense is ready, Your Honor. Your Honor, at this time we would invoke. the rule and ask that the witnesses who expect to testify be excluded.

THE COURT: Who will the State's witnesses be, Mr. Keck?

MR. KECK : We have secured the presence of both Mr. Macaluso and Mr. Nelson, Your Honor. I believe we will call Mr.. Macaluso to testify briefly and we may then call Mr. Nelson.

[4] THE COURT: In an abundance of caution, I will honor that. I'm not sure it applies in this case. These are both officers of the court, but neither one of them now is a Dallas County prosecutor so technically they're not any better than any other witness. They're just witnesses. Mr. Cunningham, you're standing preparatory to doing something. I'm going to interpret this as a fullblown Batson hearing. By that I mean, I think I am going to insist that the defense make a showing, at least a prima facie showing, that discrimination was invoked in the State's striking of certain jurors just so, if nothing else,

we will have an entire whole record. We thought, frankly, for the record, that we were doing it properly during the voir dire of the capital murder case. I felt that this Court's determination of certain objections made by the defense during that time resolved the issue of my finding on discrimination, but in view of the later cases and the Court of Criminal Appeal's particular order, I'm going to place the burden back on you—all to at least make a prima facie showing that Batson has been violated.

MR. CUNNINCHPM: Your Honor, on behalf of the defense at this time we would ask the Court to take judicial notice that Thomas Joe Miller—E1 is a member of the negro black Afro—American race.

THE COURT: I don't think there is any dispute [5] about that, is there, Mr. Keck?

MR. KECK: No, Your Honor. We will stipulate to that.

THE COURT: The Court will do that.

MR. CUNNINGHAM: Secondly, in support of our prima facie case, we would advise the Court or would show to the Court that Roderick R. Bozeman, prospective juror number seven, was a black male and was struck on February 5th of 1986, and was the first strike of the State. Secondly, that Billy Jean Fields, a black male, was the State's preemptory strike number one and Bozeman was preemptory strike number—Bozeman was preemptory strike number one and Billy Jean Fields was preemptory strike number two by the State. He was juror number nine. Joe

A. Warren, a black male, was struck by the State preemptorily and he was strike number six. He was number twenty—eight on the prospective juror list; that Edwin L. Rand was a black male, that he was struck by the State, that he was the State's preemptory strike number seven and he is thirty—seven on the prospective jury panel list; that Carol S. Bogges, a black female, was struck by the State of Texas and

that was the State's preemptory strike number eight and she is number forty on the jury list; that Wayne A. Kennedy, a black male, was struck by the State. He was the State's preemptory strike number nine and he is number [6] forty—three on the jury list.

Linda C. Baker, a black female, was struck by the State and she was the State's preemptory strike number ten and she was number seventy—one on the jury list. Mrs. Janice Mackey, a black female, was struck by the State and she was preemptory strike number twelve and she is juror number one hundred on the jury list.

Mr. Paul Bailey, a black male, was struck by the State and he was preemptory strike number thirteen. He is number one hundred and two on the jury list.

Finally, Mrs. Anna L. Keaton, a black female, was struck by the State and she was preemptory strike . number fourteen. She is number one hundred and five on the list.

The State of Texas, between February 5th of 1986 and March 6th of 1986, exercised fourteen of its preemptory strikes; that ten of those fourteen preemptory strikes used by the State were used to strike either a black male or a black female.

Further, in support of Defendant's prima facie case, we at this time would offer all the evidence beginning on March 12th, 1986 that was offered with respect to its motion to quash and/or suppress the jury panel and/or to strike the jury panel including the testimony of the witnesses John Sparling; Jack Hampton, judge of the [7] 283rd Judicial District Court; Honorable Larry Baraka, judge of Criminal District Court Number Two; Honorable Ralph Tate who, at that time was chief public defender; Mr. Norman Kinne,. first assistant district attorney of Dallas County, Texas; Mr. Paul Macaluso; the Honorable Harold K. Entz who, at that time, was County Criminal Court Number Four and is presently judge of the

194th judicial Court; the Honorable Ed. Kincaide who, at that time, was judge of the 194th Judicial District Court and is presently on the Court of Appeals district sitting in Dallas Texas; John Stauffer.

We would also, in support of our prima f acie case, offer Defendant's Exhibits Numbers Four, Five, Six, and Seven which were offered during the motion to quash the jury panel because of the systematic exclusion of black minorities and the motion to suppress which the Court overruled and denied and exception was taken thereto, We ask that all the testimony and exhibits that were offered during that hearing be introduced for the purposes of establishing our prima facie case.

We would therefore suggest to the Court that Defendant Thomas Joe Miller—El — may I have a minute, Your Honor?

THE COURT: Surely.

MR. CUNNINGHAM: Your Honor, could we have a [8] ruling on the offer of testimony and the offer of proof, Defendant's Exhibits Four, Five, Six and Seven?

THE COURT: Mr. Keck, what is the State's

position?

MR. KECK : Well, judge—

MR. CUNNINGHAM: And the testimony.

THE COURT: Is that on the motion to quash that we heard pretrial?

MR. CUNNINGHAM: Yes, sir. This hearing was conducted after we had completed the jury selection process.

MR. KECK: Judge, we would object to the Court considering any of that evidence. Unless we are mistaken, and we're confident that Mr. Cunningham and Mr. West will

correct us if we're wrong, all of that evidence, the testimony of those listed individuals beginning with justice Farling and also those exhibits, that all went to establishing past racially—based exclusion of minorities in . Dallas County. We don't, incidentally, feel that it established that historical fact. The Court recalls that testimony, I guess, but the point is, Batson itself is directed at the prosecutor's conduct in the instant case.

It would be our position, even if every one of these people had testified no black had ever served in Dallas County in the past, that testimony, however [9] historically and accurate it might be, would be irrelevant to the Court's inquiry of the instant case. The reason that we can inquire when it is appropriate to inquire into the prosecutor's reasoning in the instant case was, as I'm sure the Court recalls, in Batson the Supreme Court said that this historical approach was too difficult for defendants to meet, that it was impossible for them to amass the statistical kind of evidence needed to come up to a Swain versus Alabama type of showing and that's why that evidentiary method was jettisoned by the Supreme Court of the United States.

It is not my position, necessarily, that one can no longer make out a Sixth Amendment claim by showing that kind of historical record, but it is my contention that

type of historical record has no bearing on a Batson hearing and this case was remanded to this court exclusively for a Batson hearing, At this time there is absolutely no reason for this Court to consider what may have happened in any case tried in the past in Dallas County or, for that matter, any case tried in the future after this case was tried. All those things are irrelevant and even if they could show no black ever served before or since, in order to get a Batson remedy, they're going to have to show that in this case we struck jurors based on racial motives. If they can't do that, they will lose this [10] hearing.

MR. CUNNINGHAM: Your Honor, in response to that, Defendant's Exhibit Number Seven was a list of the ten black jurors that were actually struck in this case. That's what one of our exhibits was, Defendant's Exhibit Number Seven. Defendant's Exhibit Number Four was the Dallas Morning News for March 9, 1986, which had information in there about the selection process. Defendant's Exhibit Number Five was the Dallas Morning News for March 10, 1986 and Defendant's Exhibit Number Six was the Dallas Morning News article on March 11th, 1986.

We would further say that Batson clearly says that the defendant may rely upon any other relevant circumstances which raises an inference that the prosecutor used the selection practice to exclude the venireman from the jury on account of their race. That is what we suggest. That motion, our motion to quash the jury, which was held after the jury selection process in this case, because of the systematic exclusion of black minorities, we can rely upon those relevant circumstances. We can further rely upon the facts as to which there can be no dispute that preemptory challenges constitute a jury selection process that permits those to discriminate who are of a mind to discriminate.

THE COURT: Mr. Keck, again, I'm going to [11] overrule the State's objection to that evidence being before the Court, this Court, on this hearing. What weight, if any, I will give it, I certainly reserve for myself. Just so that the record is whole and the Court of Criminal Appeals wishes—it has got it already in front of it, I assume. That material went down. Particularly the hearing on the motion to quash the panel went down with the record, I'm sure, did it not?

MR. KECK: Yes, Your Honor.

THE COURT:— Of course, the record is clear that I denied your motion to quash the panel at the end of that hearing, so I've already made a determination there.

Again, in an abundance of caution, I will admit the evidence. Whether or not I will give it any weight is another question.

MR. KECK: Your Honor, if that concludes the stipulations offered by —

MR. CUNNINGHAM: I think at this point is where the Court decides whether or not we have made our prima facie case. We would ask the Court to—rule as to whether or not we have made our prima facie case.

THE COURT: Mr. Keck, do you want to argue on that point?

MR. KECK: Yes, Your Honor. I believe that in a typical Batson situation that might very well be true.

[12] However, here the Court has the benefit of not only now having read the Batson opinion and Keaton and some of these other cases decided by the Court of Criminal Appeals, but it also has the advantage of knowing, I guess, because we have already been through one hearing on this topic, of essentially what is going. to be produced. —

Specific ally, the Court knows that, while the State exercised fourteen preemptory challenges, it had fifteen preemptory challenges. The Court knows that one black served on this jury and that had continued to it from that, that had the state of mind to exclude blacks, that it certainly could have excluded the one back who did serve on the jury.

The Court also knows that the racial composition of the jury consisted of members of other minority races. Finally, the Court knows that the Defendant agreed to the excuse of six members of the black race in exchange for the State, I presume, to excuse other veniremen. We think the Court should consider the ultimate composition of the jury because it knows what that is now and we think the Court should also consider the fact that the Defendant agreed to the excuse of

these six black veniremen when it decides .—I mean, I take it the thrust of the Defendant's complaint is I was tried by a jury on which there was only one black person. Part of that is — part of our point would be, the [13] reason there is only one black person was because you agreed to excuse six black people. Now, that's not the only reason, the only factor. There is also the State's exercising its preemptory challenge.

We would suggest that all of the relevant circumstances, just as Mr. Cunningham has said, all of, the relevant circumstances surrounding the case, can be considered by the Court when it makes its determination of whether or not there is a prima facie case. We would suggest that those facts also ought to be considered. We are not suggesting that the explanation should be considered at this point. We would agree that that is you know, in the typical course of a Batson hearing, that is not the way it would proceed. But these other factors relevant to the racial composition of some of these other groups we feel is before the Court and ought to be considered by the Court.

MR. CUNNINGHAM: Your Honor, in response to that, Batson clearly points out the facts that you may have one black. That is not the issue. The issue is whether or not the Defendant has—well, whether or not there has been a discriminatory selection process. That is our contention with respect to the ten that they used preemptory strikes on. It becomes even clearer, when the Court looks at the number of strikes that were actually [14] used, fourteen, and then see that out of that fourteen ten were black. To say that there was a black, there was a Philippino, there was a Mexican, and there were two or three women that answers the problem, is not the answer because all the State could do is say, okay. we' re going to see which one we want and put him on there and that kills this Batson hearing. That is not Batson. They have to clearly show a specific reason for their use of preemptory strikes on each and every one of the minority, in this case

black. The fact that— they had one on there don't make any difference. I think that is Batson clearly.

MR. KECK: Judge, I'm not saying that just because a black served on the jury that answers the Court's inquiry. I'm not saying that, but I am asserting that is a factor that this Court can consider along with the fact that we had remaining preemptory challenges to exercise against that black venireman, so we have a situation in which blacks and other minorities served on the jury. To the extent that the State had unutilized preemptory challenges, it could have excluded all blacks from the jury. Now, it got some help from the Defendant's agreeing to excuse six other veniremen, but I'm just saying those are all factors that the Court should consider in determining whether these facts and circumstances raise an inference that the State exercised the preemptory [15] challenges that it did exercise against blacks based—you know, by virtue of a racially motivated reason.

THE COURT: Mr. Keck, I'm going to resolve this this way again maybe just because I'm extra cautious, because I think the Batson rule is still being expanded by the Court of Criminal Appeals. Keaton is the closest we've come to having a clear pattern of what to do. I'm going to ask and direct the State to go forward with an explanation of its strikes.

I will ultimately, of course, make the determination as to whether a prima facie case was even established or, if it was, whether or not the State's reasons were racially neutral and then, depending on what I do there, anything else if I go that far. But I think a whole record is the thrust of the Court of Criminal Appeals' order.

I do note, unless you lawyers object—I kept notes during the voir dire myself and you mentioned six blacks were apparently excused by agreement. My notes indicate those

were jurors seventeen, thirty, fifty, sixtyone, sixty—seven and eighty.

MR. CUNNINGHAM: What were they again?

THE COURT: I will give you the numbers. I have juror number seventeen, Mr. Gitchaway; number thirty, Mr. Randal; number fifty, Ms. Miller; number sixty—one, Mr. [16] Moseley; number sixty—seven, Ms. Collier; and number eighty, Mr. Tarry. Those are by agreement.

The record also probably needs to reflect from my same notes that in excess of sixty jurors out of a hundred and eight who were voir dired were excused by agreement. To go further, my understanding was, some of which is probably not on the record, by giving the various questionnaires to all the jurors, counsel on both sides, under the direction and instance of the Court, encouraged the lawyers to try to—agree to excuse jurors who would like to be struck for cause or excused for cause if they were actually voir dired . I think both sides worked toward that end and only voir dired those jurors who appeared to be potentially seated jurors. For whatever value that is, I do not know.

At any rate, Mr. Keck, I would ask and direct the State to go forward with its explanation of striking those ten particular jurors. In doing so, I will say that I certainly will consider in making whatever rule I make in this case all of the voir dire including the composition of the jury, the agreements to excuse. I'm going to rely on my own recollection which might be refreshed by my own notes of various jurors and anything else that is before me. I want this to be a complete record.

Off the record, Pam.

[17] (Whereupon, an off—the—record discussion was held between counsel and the Court.)

THE COURT: Back on the record. Mr. Keck, do you want to go forward?

DIRECT EXAMINATION OF PAUL MACALUSO

BY MR. KECK:

Q Would you State your name, please?
A Paul Macaluso.
Q Would you tell the Court how you are employed, please?
A I'm an assistant United States attorney for the Northern District of Texas.
Q How long have you been so employed?
A Since the first of the year, basically.
Q That is 1988?
A Yes.
Q How were you employed prior to that?
A I was an assistant district attorney for Dallas County, Texas.
Q How long were you employed in that capacity?
A From February of 1973 until the first of this year, 1988.
Q Let me ask you if you are familiar with the case which has resulted in this retrospective Batson hearing, that case being the State of Texas versus Thomas Joe [18] Miller—El, Cause Number F85—78668—NL?
A Yes.
Q And did you have anything to do with the prosecution of that case?
A Yes.
Q Would you state for the record, please, what your duties in that regard were?
A I was one of three, basically three, assistant district attorneys assigned by the district attorney to prosecute that case.
Q I see. Who were the other assistant district attorneys?

A Mr. Norman Kinne was the lead attorney on the case, myself, and Jim Nelson.

Q Directing your attention to the voir dire examination, was Mr. Kinne present during that voir dire examination?

A Occasionally.

Q Was there any particular problem that he had; was he just preparing for trial or

A I am assuming he was interviewing witnesses and he had other responsibilities as well. The voir dire, as I recall, took several weeks.

Q Was that kind of part of the game plan, that you—all—that you and Mr. Nelson would concentrate on [19] the voir dire and Mr. Kinne would then be lead counsel during the trial of the merits?

A That is correct.

Q From time to time did you, however, consult with Mr. Kinne about the exercise of certain of the State's preemptory challenges?

A Occasionally.

Q Not very often?

A Correct.

Q That would—be rare, in fact, that you would do that?

A Pretty rare.

Q Let me—direct your attention to—well, I'm sorry. Let me go over a couple of more general matters. As you and Mr. Nelson were interviewing the jurors through the voir dire process, let me first ask you whether or not there were jury questionnaires utilized in this case?

A Yes, there were.

Q Those were written forms?

A Yes, sir.

Q And they were passed out to the jurors prior to the time they appeared to be individually examined?

A Yes, I believe in every instance, virtually every instance.

[20] Q And copies have been made of those of the answers that they had written onto the forms and then those copies have been provided to attorneys for both parties and to the Court?

A Yes.

Q Let me ask you if you had an occasion this morning to review the rather large box containing the district attorney's trial files concerning this case?

A Yes.

Q were you able to find the State's copies of the juror questionnaires in that box?

A Some.

Q Were you able to find any of the questionnaires relating to the jurors who were preemptorily challenged?

A No, sir.

Q Did the forms that you have relate to the jurors who, in fact, served—or the veniremen who, in fact, became jurors on the jury?

A Yes, that's correct.

Q when you and Mr. Nelson were devoting your attentions to this process, who between you was the senior attorney assigned to the case to represent the State?

A I was.

Q Prior to this trial, how many capital penalty juries have you selected yourself or participated in the [21] selection of?

A I don't know for sure, but I

Q Just a rough guess.

A Ten maybe, maybe more, maybe less.

Q How many had Mr. Nelson selected, if you know?

A I don't believe he had done any. This was his first,

Q So you kind of took the lead?

A More or less.

Q Let me ask you: Did you ever come to a point in deciding whether or not to exercise a State's preemptory challenge, that you and Mr. Nelson disagreed about whether

or not a preemptory challenge should be exercised against a particular venireman?

A Not that I can recall.

Q If such an eventuality had occurred who, between you and Mr. Nelson, would have been able to make the decision on behalf of the State of Texas?

A In all probability I would have.

Q And possibly you might have consulted with Mr. Kinne in a close situation?

A That's possible, yes.

Q All right. Let me direct your attention then to venireman number one 0 two. That's Mr. Paul Bailey. I believe yesterday afternoon after the Court had instructed [22] its coordinator to call me and inform me that we were having the hearing on this matter this morning, you and I met outside the federal courthouse and I gave you a copy of the court reporter's transcription of the voir dire of Mr. Paul Bailey; is that correct?

A Yes, sir, that's correct.

Q It was in a plain brown envelope which I see you brought with you to the witness stand?

A As you see it, yes.

Q I would like to direct your attention, if I could, to page 4167 of that document..

THE COURT: What juror was that?

MR. KECK: This is Paul Bailey, Your Honor, number one 0 two. This is one of the venireman where no explanation was actually given in the record.

THE COURT: We're assuming that I'm going to review the voir dire record for explanations plus anything else I hear at this hearing?

MR. KECK : Your Honor, as to the explanations which we are giving, as to the eight black men for whom explanations appear, it is my intention to ask the Court simply to take judicial knowledge of those things. I have asked Mr. Nelson

to come in simply so that he can be here for any questions the Court might want to ask him about those reasons. If the Court pleases I can have Mr. Nelson [23] read those reasons into the record.

THE COURT: They are in front of me. I've already reviewed them preparatory to the hearing today. I will be glad, of course, to hear anything else you want to say but, if we can focus on what we have to have, it would be better for everybody.

Q (By Mr. Keck) Now, have you found that passage in your copy of the statement of facts?

A I've found page 4167.

Q All right.— Would you —

MR. CUNNINGHAM: Could we take a minute, Your Honor — could we get your copy back there?

THE COURT: Sure.

(Whereupon, there was a short break, after which the following proceedings were held.)

THE COURT: Let's get back on the record. Mr. West was excused because he had a matter that he had a conflict with and Mr. Cunningham has, of course, no problem with continuing the hearing.

MR. CUNNINGHAM: None whatsoever, Your Honor.

THE COURT: Go ahead, Mr. Keck. I think when I interrupted you—all, Mr. Macaluso was just about to be asked about his reasons for challenging juror Bailey.

Q (By Mr. Keck) Mr. Macaluso, early on in your [24] examination of Mr. Bailey, you had begun questioning him about his beliefs about the death penalty and he had indicated certain religious or personal reservations about imposing the death penalty. You had, in fact, challenged Mr. Bailey based

on Witherspoon versus Illinois and wainright versus versus Witt; is that basically correct?

A Yes.

Q Defense counsel examined Mr. Bailey on this point and finally on page—the page that is directing your attention, the Court even indicated on line twenty—two and twenty—three on page 4167—could you read that to the Court just to remind the Court of what was said?

THE COURT: Do you have the record now?

MR. CUNNINGHAM: No, sir. I will use his when he finishes.

Q (By Mr. Keck) Page 4167, beginning with line twenty—one, really.

A "THE COURT: I—11 give you—all a few minutes. It's a good question that has been raised." Then parenthetically, "(Whereupon, there was an off the record discussion between counsel and the Court, after which the following proceedings were held.)" "THE COURT: Mr. Macaluso, I'm going to hold that he is qualified. I respectfully disagree with the State on it." It just says, "MR. MACALUSO: Judge, in light of the Court's ruling and [25] in light of the statements made by the Court, we'll use a preemptory challenge.

Q Now, let me ask you, Mr. Macaluso, at that point the Court had overruled this Witherspoon challenge after having indicated that the Court at least f elt it was a good or a close question and at the point that you exercised the preemptory challenge, let me ask, you why you did that as to Mr. Bailey?

A From the record, which I have reviewed, it became obvious—I'm—just rereading the record—from the very beginning that Mr. Bailey had expressed religious, moral, and personal views in opposition to the death penalty. I thought he was very explicit about that. I felt at the beginning of the examination, throughout the examination, and at the end of

my examination that's how he felt even though he did change his position somewhere after he was examined by Mr. Cunningham. I just felt that he would not be able to fulfill his responsibilities as a juror in light of any evidence and I exercised a preemptory challenge.

Q In any event, he wasn't, in your view, an ideal State's juror by any stretch of the imagination?

A Definitely not.

Q Because or these reservations he had about the imposition of the death penalty?

[26] MR. CUNNINGHAM: Judge, object to counsel leading.

THE COURT: Don't lead.

Q (By Mr. Keck) Let me direct your attention then to—I'm sorry. Did the race of Mr. Bailey play any role whatsoever in your decision to exercise a preemptory challenge?

A None whatsoever.

Q If anyone, regardless of race, had given similar answers to his, is it your testimony that you would have utilized a preemptory challenge on such a venireman?

A Without question.

Q Even if it was your last preemptory challenge? I know it wasn't in this case, but —

A No, it wasn't. I have never been in that position but, yes, I would have to say — I guess I'm speculating to a degree but, yes, I would have had to given his statements in opposition to the death penalty.

Q Now, directing your attention to Venireman Joe Warren, which was the other venireman that I provided you a copy of that voir dire —

MR. KECK: Your Honor, this is the other venireman for whom no explanation was given.

THE COURT: What number was —

MR. KECK: He was number twenty—eight, Your [27] Honor.

Q (By Mr. Keck) Now, Mr. Macaluso, Mr. Cunningham has already stipulated that this was juror number twentyeight and that this was the State's number six preemptory challenge; in other words, the sixth preemptory challenge exercised by the State in toto on Mr. Warren. Would you describe that as early or late in the voir dire process?

A I would describe it basically as early.

Q Would you state for the Judge—I'm sure he is probably familiar but also for the record and the Court of Criminal Appeals. Would you just briefly detail perhaps how your philosophy about exercising strikes changes as we go through the voir dire process from early voir dire to late voir dire, if there is a change?

A Sure. Naturally I prefer to think that I was being conscientious and careful throughout a serious process such as this. I. think it is inevitable that early on when you're starting off, of course, examining prospective jurors and you have fifteen strikes that you have the, I don't know if you could call it, luxury for lack of a better phrase or word of using strikes and being extra careful, I suppose.

I'm sure, if I were to go back and examine strikes that I exercised early on in voir dire, I might have found — in fact, I have had judges kind of kid me [28] about exercising a strike on somebody who, I later said, I wish I had that strike back later on because you never know what kind of a venire person you're going to encounter later on in the examination.

In answer to your question partially, yes, you're probably more likely to use a strike early on on somebody and you would obviously come down to having used twelve or thirteen. It is just more precious, I guess, is a way of putting it.

Q Of course,—the other fact is, you're counting jurors who have actually been selected, too?

A Sure. I left that out. Of course, obviously if you have used twelve or thirteen strikes and you have eleven jurors, that's one thing. If you have used nine or eight strikes and you have two jurors, it is quite a bit different. There is a ratio, I suppose, of the number of strikes you have remaining to the. number of jurors you need to complete the jury.

Q Now, directing your attention back to Mr. Warren, just to we understand, in light of that explanation that you just gave, Mr. Warren's — the decision on Mr. Warren came at a point in which you, probably weren't being extra careful —

A Yes.

Q — for lack of a better word?

[29] A I guess you could say that.

Q Because you still had nine preemptory challenges left even after exercising against Warren?

A I don't recall exactly where in the voir dire examination this particular venire person fell. Assuming that the pages are numbered such — this page is in the low fifteen hundreds and Mr. Bailey was number forty—one hundred, so there would be some significant distance before Mr. Bailey.

Q Mr. Bailey, just to refresh your memory, was juror number a hundred and two. Mr. Warren was juror number twenty—eight. I realize that they were probably not all called exactly in order, but —

A No, and some jurors were excused.

Q Twenty—eight might be even called before twenty-seven?

A Right.

Q Would you state for the Court your reasons for ultimately exercising a preemptory challenge against Venireman Warren?

A I have had a chance to review what appears to be about forty pages of my examination of Mr. Warren and the

examination by Mr. Cunningham, I believe. I have noted a few things that tends to refresh my memory with regard to our decision in this case. I'm looking at page—for [30] example, on page 1543 at the bottom there at line twebtythree where he was asked by me, "I gather you f eel pretty strongly about murder, do you not? I mean, it goes without saying?" His answer was, "well, it's just like I said, you know. There are cases, I mean, personally, that I feel I wouldn't want to personally be, you know, involved with it

If I had a choice, but as far as the case, you know, if I feel that you can avoid it, you know, I think you should." He had some answers there, and I've got some other pages marked, that made references to—I thought they were inconsistent responses. At one point he says, you know, on a case—by—case basis and at another point he said, well, I think—I got the impression, at least, that he suggested that the death penalty was an easy way out, that they should be made to suffer more. Again, I don't have the benefit of the questionnaire itself. Frequently we have information on there that kind of guides us on some of the questions we ask.

He goes on in, I believe, some of the examination by Mr. Cunningham—and I imagine this would be on the questionnaire, if it were filled out. He makes reference to a brother, I believe, who had been recently convicted. By the way, the section I was referring to just a moment ago about these unusual feelings he had about whether someone is really being punished by the death [31] penalty or not and ambivalent to—on page 1532 basically lines nine through seventeen.

Q Could you just read those, Mr. Macaluso, so we could all be reminded of them?

A I assume I'm asking about what the death penalty accomplishes and the question before that was, "What do you think it accomplishes when you feel it does?"

Answer, "I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment."

Back to what I was referring to about—and I believe it is in response to some questions by Mr. Cunningham on page 1556. On line four there is a reference to apparently something that had happened to the venire person's son. There is a question beginning on line four, a question by Mr. Cunningham, "This mishap that your son was involved in, was that Bengy or Joe, Jr.?" Answer, "That was Joe, Jr." Question, "Did anything happen as a result of that that might affect your decision if chosen as a juror in this case, sir?" "No."

It goes on, question, "That was something at [32] school?" "Yes, it was." I don't recall in reading my examination of Mr. Warren any mention in particular was made of that initially. I don't know how the time ran on that, but I gather there was something on the questionnaire. I don't have the questionnaire before me nor have I had a chance to see it before I testified here.

At the bottom of page 1556 beginning with line twenty—four, actually line twenty—two, question, "Was your brother—in—law a victim of a crime in Las Vegas?" Answer, "My brother. Yes." "Okay. What type of crime was it?"- Answer, "I don't know the details of it, sir. He had to make restitution of some money. It involved some food stamps or something, but I don't know all the details of it. He was convicted and got a probated sentence. He had to make restitution of some money."

Question, "How long ago was that, sir?" Answer, "That was about a year and a half or two ago."

Those are the basic reasons. without the benefit of the questionnaire, we just felt that he—you know, at that juncture and at that point in the voir dire examination with nine strikes remaining, we thought it would be best to exercise a preemptory challenge. We did not think he would be a favorable juror for the State.

Let me ask you the same question that I asked you about Mr. Bailey, if this particular venireman, that is [33] Mr. Warren, had presented himself at a time in which you have one more challenge to exercise, one more preemptory challenge, would you have been as likely to think about utilizing it?

A No, I would not have.

Q Also, part of it was just at this point in voir dire Mr. Warren gave his answers and he was not as clearly disfavorable to the State as Mr. Bailey?

A That's correct.

Q And I think you have indicated that Mr. Bailey was, in your judgment, pretty—about as unfavorable as one could get?

A To the point that we submitted him for cause.

Q With regard to Mr. Warren, did the race of this venireman play any role whatsoever in your decision to exercise a State's preemptory challenge against him?

A No.

MR. KECK: Your Honor, we will pass the witness.

THE COURT: Mr. Cunningham, do you wish to cross—examine?

MR. CUNNINGHAM: Yes.

MR. KECK: Your Honor, could the record reflect that I have tendered to Mr. Cunningham the State's copies of the

transcript of the voir dire of both Mr. Warren and Mr. Bailey. He has those available to him for cross [34] examination or whatever purpose he would like to use them.

THE COURT: Mr. Cunningham, do you need any time to look through those?

MR. CUNNINGHAM: My understanding is that the . Court is going to review those?

THE COURT: Correct. Before I decide anything in this case, I will would like the opportunity to reread the testimony myself at least of these two jurors and probably all of the jurors that were challenged. MR. CUNNINGHAM: Just so the record will reflect, they were submitted to counsel for the Defendant while the hearing was in process.

CROSS—EXAMINATION OF MR. MACALUSO

BY MR. CUNNINGHAM

Q Mr. Macaluso, did I understand you to say that the reason why you may exercise a preemptory challenge early in the selection process may differ when you have used a large number of your preemptory challenges?

A That's correct.

Q So that you start out in the beginning and your selecting process in the beginning—for example in this case beginning on February 5, 1986, when you struck, Mr. Bozeman and when you struck Mr. Bailey on March 5, 1986, Mr. Bozeman being number one and Mr. Bailey being with thirteen strikes, your reason for striking Bozeman vis a [35] vis Bailey is different?

A That would largely be true. The same considerations are made but I—that largely would be true.

Q So that the more strikes you use and the least number that you have affects how you look at a prospective juror and particularly a black juror as the process goes on?

A No, not with regard to a black juror in that consideration or any other color juror, for that matter. something else is left out. It is just not the number of strikes. As Mr. Keck pointed out, it. is the number of jurors that remain to be seated. I car recall, for example, a situation in this particular case where I can recall vividly one of the persons who was on this jury, I will be honest with you, I would have struck him. If he had been in Mr. Warren's position, I would have struck him faster, if there is such a thing, than I did Mr, Warren..

Q You said what?

A I can recall there was a juror on this case that I would have—that we accepted. I think he was either the eleventh—I believe he was the eleventh juror, maybe the tenth juror. I can't recall which, but way on in the process, that I would have —

Q I can't hear you for that door. Now, you were [36] saying?

A I was saying that I can recall specifically — I can recall two people that I probably would have struck if they had appeared in the array earlier on, say, if they had switched places and been number twenty—eight where Mr. Warren was. I can recall two individuals that, if I had them occur then, I would have struck them. It occurred later on when we had more seats to fill, we had fewer strikes, and I had to take a chance on them.

Q were these—people that you are talking about actually selected?

A Yes, sir.

Q One of them was a Philippino?

A No.

Q One a Spanish sir name?

A He had a Spanish sir name.

Q So the other one was a black?

A No. It was a white female.

Q Was that juror number twelve?

A I think we're thinking about the same person.

THE COURT: Juror number one 0 eight, I believe.

Q (By Mr. Cunningham) Ms. Sandra Hearne?

A Nothing personal against either of those jurors, I might add.

Q You did not strike Ms. Sandra Hearne, juror [37] number one 0 eight?

A If she was the last juror seated, that's the one.

Q She was the last juror seated.

A Right.

Q And was seated when you had one strike left; is that correct?

A I would have to take your word for it. I'm not denying that it probably is accurate. I think she was the last juror seated. I think we did have one strike left.

MR. CUNNINGHAM: That's all, Your Honor.

THE COURT: Is that all, Mr. Keck? I just have one question that may already have been asked, but why don't you go ahead and finish. I just have a couple of questions which you may have asked and I just didn't hear them.

REDIRECT EXAMINATION OF MR. MACALUSO

BY MR. KECK:

Q Mr. Macaluso, just so we understand, as voir dire progresses, I didn't understand you to say that your feelings about any particular venireman changed. In other words, you like them or dislike them just as much as you would have, but your reluctance or eagerness to exercise a preemptory challenge against this sort of marginal venireman, that may change as the voir dire progresses and [38] you have used more of your challenges?

A That would be true. A large part of it or at least a substantial part of it is that as things begin to wind down, as you get eight, nine or ten jurors, you can better calculate obviously. You know how many people you need and how

many strikes you have left. You can look down the list of people that you have questionnaires, which we examine, and we can make some judgment calls on people we feel would be better suited towards the case in our opinion. We can better estimate how many strikes we're going to need and take those into consideration and some of the strategies that come into play, I'm sure, on both sides in that regard in using strikes at that time. It is much more difficult to do early on in the voir dire.

MR. KECK: Thank you.

RECROSS—EXAMINATION OF MR. MACALUSO

BY MR. CUNNINGHAM:

Q Mr. Warren did not say anything that indicated to you that he would be unfair to the State?

A Well, he didn't say in so many words, no, but I have to go just from my review of his examination on the basis of some of his answers and some of his positions and the other information about his having some family members who had either been convicted of crimes or were on probation or whatever, that I felt he would be more biased [39] towards the Defendant in the case.

MR. CUNNINGHAM: That's all, Your Honor.

EXAMINATION OF MR. MACALUSO

BY THE COURT:

Q Mr. Macaluso, you have testified to your strategy in selecting the jurors in a capital murder case. And you have participated in voir dire in capital murder selections; is that correct?

A In others?

Q Yes.

A Yes.

Q Can you give me any number?

A How many all total?

Q A ball park figure.

A Maybe fifteen — not as of that time. Maybe ten at that time.

Q This may not be relevant, but maybe it ought to be in the record. I believe our manner of doing voir dire was to bring up fifty jurors each Monday, to qualify fifty, and then commence to conduct voir dire through that list and then at the end of the week quit and bring up fifty new ones on Monday. Is that how we did this case? Did I recall it correctly?

A Yes.

Q Which again may or may not affect the strategy [40] of either side in exercising their strikes; in other words, not knowing what is going to come the next Monday?

A I don't recollect there was a special venire in this case.

MR. CUNNINGHAM: There was not a special venire. In fact, we started with a brand new panel the following Monday.

A I do recall now that I believe Mr. Nelson and I would alternate with Mr. West when making shuffles, I believe, down in the central jury room on the various Mondays.

Q I recall many shuffles. That's why I asked that question.

MR. CUNNINGHAM: There was a shuffle each Monday.

THE COURT: That's all I have.

MR. CUNNINGHAM: This is also true, I think, that if there were ten, eleven, or whatever the number was, that were not reached when we broke on Friday, every one after that number was excused from service.

THE COURT: I think that is true.

MR. CUNNINGHAM: And then on Monday we started the process all over again with a brand new panel.

MR. KECK : Your Honor, before Mr. Macaluso is excused I should mention that, in fairness to Mr. [41] Cunningham, I intend as to Venireman Bozeman, venireman number seven, to ask the Court to take judicial notice of the explanation that was given for the exercise of the State's preemptory challenge against Mr. Bozeman. That explanation was given by Mr. Macaluso and it appears in volume number one, really, of the voir dire, which is page 323 and 324, according to my records.

THE COURT: You have set that same matter out in your motion for rehearing your brief. Is that what you are referring to?

MR. KECK: Yes, Your Honor.

THE COURT: I have that in front of me.

MR. KECK: I mention it only so that perhaps we can excuse Mr. Macaluso. I did mention it in the brief, but I have the reason here—it may be that Mr. Cunningham would like some opportunity to cross-examine Mr. Macaluso on that reason before he leave the stand. Mr. Nelson provided the State's reasons for the exercising of the State's challenge as to the other seven veniremen. He is also available to be cross-examined. I just thought we might give Mr. Cunningham that opportunity now.

MR. CUNNINGHAM: Your Honor, if I had wanted one, I would have used THE COURT: Beg your pardon?

MR. CUNNINGHAM: As far as I am concerned, Mr. [42] Macaluso can be excused if the State has no further questions they want to ask him. The defense has asked him all the questions they want.

THE COURT: Anything else, Mr. Keck?

MR. KECK: No, Your Honor.

THE COURT: Mr., Macaluso, you can be excused. Thank you, sir.

Mr. Keck, does the State have any additional evidence it wants the Court to consider on the hearing?

MR. KECK: Not at this time, Your Honor, other than the fact that we would like the Court to take judicial notice of all of the explanations for the other eight veniremen. Those are set forth in our motion, but you might want to write down—I'm not sure that it says as to all of them the specific place in the record.

Now, the State and the appellant used a numbering system for the—because of the edition of the transcript, there may have been two transcripts or a preliminary hearing that was also reported, but the numbers that I have used in my brief do not correspond to the numbers of the voir dire. For example, the volume number ten of the voir dire, we refer to in our brief as R-12. In other words, there are two more added onto it. There are references in my motion that reflect the two plus, if you will, system of indicating the volume of the transcription.

[43] As to Anna Keaton, the explanation provided by Mr. Nelson to the Court is found at volume thirteen, page 4373.

MR. CUNNINGHAM: Wait a minute. Volume thirteen, page what?

MR. KECK: Page 4373.

THE COURT: That is the numbering system that is in the Court of Criminal Appeals'; is that correct?

MR. KECK: Yes, Your Honor. If you went back and looked at these volumes, it would appear to be like volume eleven, Volume XI.

MR. CUNNINGHAM: Where do you get thirteen?

MR. KECK: Well, we call this R-13 because, you know, R-1, our transcript—I think maybe there were two transcripts or maybe there was some preliminary hearing even before voir dire that was really R-2. See, what I'm getting at is, it says ten but really we both called it R12. On the cover of it, it says volume ten of voir dire.

With regard to venireman Mackey, the explanation is found at Roman numeral thirteen, 4374. I believe also at that page, the Court itself recognizes that it can see that juror Matthews is not an ideal juror although the challenge for cause is overruled by the Court.

We've already gone over Juror Bozeman. With regards to Venireman Fields, that explanation is found at [44] page 450 of the first volume of the voir dire. That's R-3. Again, that explanation was provided by Mr. Nelson. I think that explanation is perhaps reiterated in the State's motion that the Court has been provided with.

With regard to Venireman Rand, that explanation by the State is found at Roman numeral six at 1855 and 1856. I believe that is also set forth in our motion, judge. The voir dire of Venireman Rand begins at 1805, Your Honor.

With regards to Venireman Bogges, number forty, the explanation given by the prosecutor, again that was Mr. Nelson in giving the explanation, is at Roman numeral six, 2043.

With regard to Venireman Kennedy, Mr. Nelson's explanation appears at our Roman number seven dash 2939 through 2940 and I believe that is also reproduced in our brief, Your Honor.

The final explained venireman that Mr. Nelson provided explanations at volume ten, page 3017 through 3018.

We would ask the Court to take judicial notice of all those explanations and we would submit that they were given at a

time that the prosecutors had both discussed the mutter and reflected the contemporary reason before this case has been remanded. I would also like the [45] record to reflect that I know the Court whenever it recesses has seen Mr. Nelson and Mr. Nelson has been in the witness room and he is ready to be cross-examined on any of these reasons by Mr. Cunningham if that is his desire. I don't think it would serve the State's purpose or interest to examine him seeing as the reasons are all in the record and available for the Court's consideration.

THE COURT: Thank you, Mr. Keck. Mr. Cunningham, I will give you a chance to reply to any of that, if you wish, but are both sides prepared to close evidence now?

MR. CUNNINGHAM: Yes.

MR. KECK: Yes, Your Honor.

THE COURT: I'm going to, of course, reread the voir dire of the ten challenged jurors. I did read some of it already after you filed your earlier motion with the Court of Criminal Appeals. I found what I read consistent with your summary and your motion, so I don't suspect that it is not accurate.

Do you-all wish to make argument on this at this point in time? I don't know if this is particularly a fact-finding hearing as I understand the Court of Criminal Appeals' mandate, but I certainly think there is a position that one side or the other can take.

MR. KECK: Your Honor, I would just submit to [46] the Court that the Court itself—and you might also want to make a note of this: At page our Roman numeral fourteen dash twenty-two, the Court found that on every strike where the defense asked for an explanation, the State has provided satisfactorily to the Court it as not being racially motivated. That was before Batson came down, before anything that maybe challenges or changes the way the Court is thinking about things. I think that is an important finding. As to those

eight veniremen, black veniremen, who were peremptorily challenged by the State, this Court at the time the matter was fresh in its mind felt that the prosecutor's explanations satisfied the Court that they were not racially related reasons.

In Keaton versus State—now, this is the last Keaton, Keaton number three, the one that was decided on April 6th, 1988. I know the Court has read this. On page eight and nine, the Court of Criminal Appeals in Keaton refers to these five factors which will weigh heavily against the legitimacy of any explanation which is offered by the prosecutors. Those factors are, first, that an explanation based on group bias where the group trait did not show to apply to the challenged juror specifically. I would submit to the Court that there has been absolutely no indication that any of the explanations are subject to this first factor.

[47] Second, that no examination or a perfunctory examination of the challenged juror. Again, I would submit that the court can see that all of these black veniremen were examined extensively. This isn't a situation where the State just asked a few questions of the black veniremen and then struck them. The implication of that, of course, would be, well, we were going to strike them all along because they were black. That certainly didn't happen in this case.

The third factor, just for an examination of the challenged juror, i.e., questioning a challenged venire person so as to evoke a certain response without asking the same question of other panel members. Here there probably were certain questions that were asked of certain of these black veniremen who were challenged by the State that were not asked of all the veniremen. But to the extent that that occurred, the State would suggest that—for example, Mr. Bailey, he had indicated on his form, and it is clear through the whole context of his voir dire, that he had his opposition to the death penalty.

Of course, the white and other nonwhite veniremen who didn't make those responses, they weren't questioned about them as thoroughly—or heir feelings about the death penalty as thoroughly as the jurors who did indicate a reservation about imposing the death penalty. [48] Our point would be, to the extent that there was a just for examination, it can be explained by nonrace-related factors. Probably in most cases, the jurors answered these questions that the prosecutors testified they relied on.

The fourth factor, the reason given for the challenge is unrelated to the facts of the case. I think there is none of these situations where it can really truly be said that the reasons given were not somehow related to the facts of the case.

Finally, this is for a treatment where there is no difference between the responses given in an unchallenged venire person. At no time has the Defendant urged that there are unchallenged venire persons who did not have these same traits that the prosecutors testified either at trial or in this hearing that they relied on in exercising the State's preemptory challenges.

We urge the Court to conclude that there is no reason to discount the explanations given by the prosecutors at this hearing or at the time they were called upon to give explanations at trial. For that reason, the Defendant has failed to show that the explanations, which were given by the prosecutors, were incorrect or should not be accepted by the Court. The State has gone forward with its burden of producing evidence and the Defendant has failed to sustain his burden of proof on the issue of the [49] racial-related reasons. For that reason, we think this Court should find that none of the State's preemptory challenges were exercised for a racially-related motive. THE COURT: Mr. Cunningham, do you want to reply to that?

MR. CUNNINGHAM: Not at this time, Your Honor. we may at a later date after we review the record and also, hopefully, by the time we have an opportunity to review the facts of this particular hearing—then we may ask the Court to let us present oral argument, but it would be after we get—after we have an opportunity to review the record voir dire of these ten and also look at the hearing today as the Court is going to do.

MR. KECK: Would the Court prefer to have some sort of proposed findings of fact?

THE COURT: Mr. Cunningham, without prejudging the case, I'm going to find at this point, based on what . I've heard today and my recollection of it all, to agree with Mr. Keck's position, but with this qualification: I want the same benefit o f everything that you've talked about and that is to review the records myself. I'm going to ask Mr. Keck though, in anticipation of this hearing that we're going to have, to prepare some proposed findings and conclusions so that he can furnish the defense a copy, of course, and I will have those in front of me at the time [50] that we have our hearing.

MR. KECK: It may be useful to have Mr. Cunningham prepare findings also and then you will have both of them.

MR. CUNNINGHAM: If you want me to, I will prepare findings establishing a prima facie. case. You can then prepare yours where you say there are specific reasons with respect to the ten and we would ask for a few days after his reasons for the ten so maybe we could have some counter findings of facts.

THE COURT: Mr. Keck, can you get your proposed findings in by next Monday? Is that too soon in view of the fact the record we had here today won't be—or is that too soon?

MR. KECK: I need a couple of days after the record is—

THE COURT: Off the record.

(Whereupon, the proceedings in this cause were concluded.)

[51]

STATE OF TEXAS

COUNTY OF DALLAS

I, PAMELA SMITH, Official Court Reporter in and for Criminal District Court No. 5 of Dallas County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all the proceedings directed to be included in the statement of facts in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

Witness my hand, this the 16th day of May, A.D., 1988.

/s/ PAM SMITH

PAM SMITH
OFFICIAL COURT REPORTER
Certification No. of Reporter: 112
Date of Expiration of
Current Certification: 12-31-88

CRIMINAL DISTRICT COURT NO. 5
Dallas County Courthouse
600 Commerce
Dallas, Texas 75202
214/749-6696

IN THE CRIMINAL DISTRICT COURT NO. 5
DALLAS COUNTY, TEXAS
NO. 8668-NL
THE STATE OF TEXAS

vs

THOMAS JOE MILLER-EL

FINDINGS OF FACT AND CONCLUSIONS OF LAW UPON REMAND FROM THE COURT OF CRIMINAL APPEALS I.

I

PROCEDURAL HISTORY LEADING TO REMAND

Thomas Joe Miller-E1, hereinafter referred to as "Defendant," was charged by indictment with capital murder. Following jury voir dire conducted in February and March of 1986, the Defendant was found guilty of capital murder and sentenced to death. The Defendant appealed his conviction to the Court of Criminal Appeals, raising *inter alia*, a claim that the prosecutors who selected the jury in the instant, case violated the principles enunciated in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1722, 90 L.Ed.2d 69 (1986).

On March 3, 1988, the Court of Criminal Appeals returned an opinion which abated the appeal to this court with instructions to "conduct further proceedings not inconsistent with this opinion and *Batson*" and to forward the record of those proceedings and Findings of Fact and Conclusions of Law to the Court of Criminal Appeals. Opinion of March 3, 1988, 748 S.W.2d 459,461.

The State filed a motion for rehearing which was denied by the Court of Criminal Appeals on April 27, 1988. In the interim, the Court of Criminal Appeals had decided *Keeton v. State*, 749 S.W.2d 861 (Tex. Crim. App. 1988) (opinion following abatement).

Accordingly, in its opinion of April 27, 1988, denying the State's motion for rehearing, the Court of Criminal Appeals stated:

> This appeal is abated to the trial court with instructions that it conduct a hearing pursuant to the full procedure and steps outlined in *Keeton v. State* . . .
>
> Order of 4/27/88.

Because the State's Motion for Rehearing sought to clarify the issue of whether this court could determine whether a prima facie case of purposeful discrimination had been established by the Defendant, this Court deems the use of the phrase "full procedure and steps outlined in *Keeton*' in the order of April 27, 1988 to have added significance[1] and has interpreted the use of this phrase to mean that this Court is to perform all the prongs of the analysis set out in *Keeton*.

II

THE RETROSPECTIVE *BATSON* HEARING

On May 10, 1988, this court conducted a hearing on the *Batson* issues. At that time, the court noted that certain facts were not in dispute or could be stipulated by the parties. S.F. 4-15.[2]

This Court withheld its rulings on the prima facie showing issue and, without objection from either party, asked the State

---

[1]It may be that the Court of Criminal Appeals' original opinion ordering a remand to this court also authorized this court to make the prima facie case determination:

> However, it is not for this Court to say whether there was any racial motivation in the prosecutor's actions. Batson requires such a determination being made by he trial court. *Miller-El, supra*, at 460

[2]The court reporter's transcription of this hearing has been typed. It is referred to throughout this set of Findings as: S.F.

to produce its reasons for striking the ten black veniremen. S.F. 15-16.

The State then called Mr. Paul Macaluso, an assistant United States attorney, who, at the time of trial, was the Dallas County Assistant District Attorney in charge of the State's voir dire in the instant case. S.F. 17-18; 20-21.

Mr. Macaluso then testified concerning the reasons that the State had exercised peremptory challenges against venireman, No. 102, Paul Bailey. S.F. 21-26. Basically, he testified that he exercised peremptory challenge against Bailey due to the opposition to the death penalty which Bailey had expressed in jury questionnaires and during voir dire. He also testified that race played no part in his decision to strike Bailey.

Mr. Macaluso also testified concerning the State's reasons for striking Venireman Joe Warren. S.F. 26-33. In sum, these reasons included the fact that Warren's brother was a convicted felon, that Warren had given what the State regarded to be inconsistent responses to questions during voir dire regarding the death penalty, and certain answers concerning an incident involving Warren's son. All of these factors led the prosecutors to conclude that Warren would not be a juror favorable to the State. Race played no part in deciding to strike Warren.

The court indicated that it would consider the reasons provided by the State at trial for striking of the other eight black veniremen. S.F. 16; 34; 44-45.

III.

UNDISPUTED FACTS AND LEGAL ISSUES

The following facts, which are relevant to the *Batson* issues before this court, are not disputed:

1) The Defendant is black, and, therefore, he is a member of a "cognizable racial group" for purposes of Batson.

2) That jury voir dire occurred in February and March of 1986, well before the return of the Supreme Court's opinion in Batson.

3) That during the course of the individual voir dire process, the State exercised 14 of its 15 peremptory challenges.

4) That the State exercised 10 of these 14 peremptory challenges against veniremen of the Defendant's race.

5) That six other black veniremen were excused by the agreement of the parties.

6) That the jury selected and impaneled had nine white jurors, one Hispanic juror, one black juror, and one Filipino juror.

IV.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DISPUTED ISSUES

A. Prima Facie Case

At the time of the trial in this case, this court was convinced that none of the State's peremptory challenges were made for race-related reasons. The court remains convinced that this is true, and holds that the evidence did not even raise an inference of racial motivation in the use of the state's peremptory challenges. While it is true that the State used 10 of its 14 peremptory challenges against black veniremen, it is also true that one black venireman did serve on the jury. However, such raw numbers, while instructive, are not the sole basis for this court's holding; rather, the court has considered the entire voir dire process, including the undisputed facts set forth in Part III, supra, and the explanations for the exercise of the State's peremptory challenges offered at trial and at the retrospective Batson hearing. In this regard, this Court has considered the

procedure outlined by the Supreme Court of Missouri in *State v. Antwine*, 743 S.W.2d 51 (Mo. banc 1987), an opinion quoted extensively by the Court of Criminal Appeals in its opinion in Keeton v. State, supra. See, 749 S.W.2d at 865-66. In Antwine, the Court stated:

> As a practical matter, the third element of the prima facie case under Batson—"facts and any other relevant circumstances raise an inference that the prosecutor used (his peremptory challenges) to exclude the veniremen from the petit jury on account of their race"—requires the trial court to consider the State's explanation of the manner in which it employed its challenges prior to making a final determination as to whether a prima facie case exists. We must therefore direct our trial judges to consider the prosecutor's explanations as part of the process of determining whether a defendant has established a prima facie case of racially discriminatory use of peremptory challenges.

Antwine, 743 S.W.2d at 64.

B. Reasonableness of the State's Explanations

Because this court does not wish to unduly delay the progress of the appeal of this case, it required the State to produce explanations for the exercise of all of her peremptory challenges, notwithstanding the court's belief in the correctness of its ruling on the prima facie showing issue.

The Court has considered the reasons given at trial and those offered at the hearing on remand. As to the ten black veniremen in question, the Court makes the following Findings of Fact and Conclusions of Law:

1. The Court finds that the prosecutor came forward with a neutral explanation for each of the State's peremptory challenges of a venireman of the Defendant's race.

2. The Court finds that the explanations given by the prosecutor in each case were completely credible.
3. The Court finds that explanations given by the prosecutor as to each venireman were completely sufficient as to content.
4. The Court finds that none of the explanations given by the prosecutor were based on a group trait which was not shown to apply to the challenged veniremen specifically.
5. The Court finds that none of the veniremen in question were examined only perfunctorily by the prosecutors.
6. The Court finds that no disparate prosecutorial examination of any of the veniremen in question has been shown.
7. The Court finds that the primary reasons for the exercise of the challenges against each of the veniremen in question, their reluctance to assess or reservations concerning the imposition of the death penalty, were closely and directly related to the facts of the case, insofar as this was a death penalty case.
8. The Court finds the other factors cited by the prosecutors were reasonably related to the facts of the case.
9. The Court finds that there has been no showing by the Defendant of disparate treatment by the prosecutor of the black veniremen in question versus non-black veniremen, where there was a difference between the responses given by veniremen who were and who were not challenged by the State.
10. The Court finds that there was no purposeful discrimination by the prosecutor in the use of his peremptory strikes.

SIGNED THIS 13 day of January 1989.

/s/ Pat McDowell
PAT McDowell, Judge
Criminal District Court No. 5
Dallas County, Texas

NO. 69,677

THE STATE OF TEXAS,
Appellee,

v.

THOMAS JOE MILLER-EL,
Appellant.

Appeal form the Criminal District Court No. 5
[DALLAS County]

OPINION

Appellant was convicted of Capital Murder for shooting to death an Irving motel clerk during the course of committing Robbery. *See* V.T.C.A., Penal Code, Section 19.03 (a) (2). The historical facts of this case are reported at *Miller-El v. State*, 782 S.W.2d 892, 893-894 (Tex.Cr.App. 1990). Punishment was assessed at death. *See* Art. 37.071 (b), V.A.C.C.P. Appeal to this Court is automatic. See Art. 37.071 (h), V.A.C.C.P.; Tex.R.App. Proc. 40 (b) (1) .

I.

In his first seven points of error appellant makes various complaints related to the allegedly intentional exclusion of black veniremembers from jury service by the prosecuting attorneys in this case. *See Swain v. Alabama*, 380 U.S. 202 (1-965) ; *Strauder v. West Virginia*, 100 U.S. 303 (1880). To the extent that these points implicate a claimed Sixth Amendment right to a petit jury reflecting a fair cross-section of appellant's community, we note only that such right has not been recognized by the Supreme Court, nor is its recognition by that Court anticipated by this one. *Holland v. Illinois*, 493 U.S. 474 (1990) ; *Seubert v. State*, 787 S.W.2d 68 (Tex.Cr.App. 1990).

Nevertheless, the original appellate record in this cause does disclose that appellant is himself an African-American and that a sufficiently disproportionate number of black veniremembers were removed by peremptory challenge of the State as to make a prima facie case of racial discrimination in the jury selection process, contrary to the Fourteenth Amendment. Because *Batson v. Kentucky*, 476 U.S. 79 (1986), was not decided until after trial of this cause, we abated the appeal and remanded for an evidentiary hearing in the trial court on the ultimate question of intentional discrimination. *Miller-El v. State*, 748 S.W.2d 459 (Tex.Cr.App. 1988). See *Griffith v, Kentucky*, 479 U.S. 314 (1987). We have received the supplemental transcript and statement of facts from this hearing, including the trial judge's findings of fact and conclusions of law. Based upon our independent evaluation of the supplemented record, we are of the opinion that no error is shown.

With respect to each black veniremember against whom the State exercised a peremptory challenge, a racially neutral explanation, reasonably related to the trial of this case, was offered by prosecution witnesses. See Appendix A. Thus, it became appellant's burden to prove by a preponderance of the evidence that such explanations were untrue in fact and that one or more African American veniremembers were indeed struck by the State on account of their race. *Tompkins v. State*, 774 S.W.2d 195, 201-202 (Tex.Cr.App. 1987).

We have carefully reviewed the voir dire examination of these prospective jurors and find ample support there for the prosecutor's racially neutral explanations. *See Young v. State*, 826 S.W.2d 141 (Tex.Cr.App. 1992). Accordingly, we do not believe that such explanations are patently implausible or so contrary to the evidence as to be unworthy of belief as a matter of law. Cf. *Whitsey v. State*, 796 S.W.2d 707, 720 (Tex.Cr.App. 1989) (opinion on. rehearing). Accordingly, we do not find the trial judge's conclusion that no black

veniremembers were intentionally excluded on account of their race to be clearly erroneous.

Appellant's first seven points of error are overruled.

II.

Appellant next complains that ten prospective jurors should have been excluded for cause on his motion, mainly because their attitudes about punishment were so harsh that they could not realistically consider the minimum penalty for murder or give fair effect to the presumption of innocence. *See, e.g., Faulder v State*, 745 S.W.2d 327, 339 (Tex.Cr.App. 1987), and *Homan v State*, 662 S.W.2d 372 (Tex.Cr.App. 1984), *respectively.*

The fact that a veniremember holds strictly retributive values or advocates severe punishment for criminal offenders does not disqualify him from jury service in this state. Just as those opposed to capital punishment or inclined to leniency in general are legally qualified jurors, so also are those holding an opposite system. of values. Neither kind of person is challengeable for cause unless he harbors a bias or prejudice against the law which is likely to prevent or substantially impair performance of his duties as a juror.

One who regards with disfavor the minimum penalty for a criminal offense is not necessarily suffering an objectionable impairment. *See Williams v. State*, 773 S.W.2d 525, 535-537 (Tex. Cr. App. 1988). So long as he is able to give the entire legal range of punishment due consideration, he is a fully capable juror under the laws of Texas. *Cordova v. State*, 733 S.W.2d 175, 164-185 (Tex.Cr.App. 1987). Likewise, those who express the accurate belief that indictees are officially suspected of wrongdoing do not thereby possess a fatal bias against the presumption of innocence unless they are also unwilling to base their conclusions about culpability entirely upon the evidence actually adduced in their presence at trial.

See Mays v. State, 726 S.W.2d 937, 951 (Tex.Cr.App. 1986) ; *Bell v. State*, 724 S.W.2d 780, 797 (Tex.Cr.App. . 1986).

We have carefully examined the complete voir dire examination of each veniremember whom appellant claims was challengeable for cause, whether for prejudice against the full range of punishment or bias against the presumption of innocence. As to each respective claim, we find credible assertions of willingness to obey instructions of the court with respect to all matters of law affecting jury deliberations and to consider the full range of punishment applicable to every potential offense in the case. *See Appendix B*. Consequently, appellant has not persuaded us that the trial judge erred by rejecting his challenge to any specified veniremember.

Points of error eight through sixteen, inclusive, are overruled.

III.

In his seventeenth point of error appellant claims that the trial judge erred in refusing to allow him additional peremptory challenges during the jury selection process.

By law, each side in a capital murder prosecution wherein the death penalty is a possible punishment is allowed to decline, without specific legal cause, the service of fifteen prospective jurors. Art. 35.15 (a), V.A.C.C.P. The law does not authorize more peremptory challenges than this except for the selection of alternate jurors. Art. 35.15 (d), V.A.C.C.P. The only other instance in which an additional challenge should be dispensed by the trial judge is where he has erroneously denied an earlier challenge for cause and the aggrieved party was thereby forced to use a peremptory strike against an objectionable juror. *Demouchette v. State*, 731 S.W.2d 75, 83 (Tex.Cr.App. 1986); *Thomas v. State*, 701 S.W.2d 653, 658 (Tex.Cr.App. 1985). In such case, however, the additional challenge merely restores a full complement of strikes to the offended party.

Because appellant did not demonstrate in Part II, ante, that he was forced to expend peremptory challenges against veniremembers who should have been removed for cause at his request, failure to' allow him more peremptory challenges was not improper. *Barney v. State*, 698 S.W.2d 114, 124 (Tex.Cr.App. 1985) ; *Von Byrd v. State*, 569 S.W.2d 883, 892-893 (Tex.Cr.App. 1978).

Appellant's seventeenth point of error is overruled.

IV.

Points of error eighteen and nineteen pertain to two witnesses called by the defense who refused to testify at trial upon the ground that their testimony might incriminate them. Appellant sought "transactional immunity" for both, and here complains that the trial judge erroneously denied it. Arguing that the State is generally entitled to such immunity for prosecution witnesses under V.T.C.A., Penal Code, Section 71.04, appellant insists that ordinary principles of fairness secure him a like consideration.

Hut the statute to which he refers applies by its terms only to "an offense under this chapter[,]" meaning an offense under Chapter 71 of the Penal Code. Since appellant was not charged with such an offense in the instant prosecution, it does not appear that Section 71.04 is in control of his demand for witness immunity. In any case, neither the statute, the constitutional right of compulsory process, nor the vital decisional law of this State assures an accused equal license to compel a grant of immunity for purposes of obtaining testimony otherwise subject to the privilege against self-incrimination. Autry v. Estelle, 706 F.2d 1394, 14001403 (5th Cir. 1983); *United States v. Chagra*, 669 F.2d 241, 258261 (5th Cir. 1982); *Moorhouse v. State*, 614 S.W.2d 450, 453 n. 3 (Tex.Cr.App. 1981) (Clinton, J., concurring); *Ross v. State*, 486 S.W.2d 327, 328-329 (Tex.Cr.App. 1972). But see *Norman v. State*, 588 S.W.2d 340, 343-345 (Tex.Cr.App.

1979). Witnesses who possess the privilege are themselves only entitled to testimonial or use immunity under such circumstances. *Kastigar v. United States*, 406 U.S. 441 (1972); Ex parte Wilkinson, 641 S.W.2d 927, 929-930 (Tex.Cr.App. 1982); Ex parte Shorthouse, 640 S.W.2d 924 (Tex.Cr.App. 1982). Accordingly, appellant's demand of transactional immunity for his witnesses need not have been granted by the trial judge.

Points of error eighteen and nineteen are overruled.

V.

Appellant's wife, a coindictee, also invoked her privilege not to testify at trial. However, appellant claims that she waived the privilege by testifying outside the jury's presence as to her name, age, marital status, and whereabouts on a date pertinent to the instant prosecution. The trial judge agreed and held her in contempt for refusing to testify before the jury, but denied appellant's request to read a transcription of her earlier testimony to the jury instead. Because this transcription would have included statements made to the trial judge tending to create an alibi for appellant, he maintains it was error to exclude the evidence.

We need not decide whether appellant's wife indeed waived her privilege not to testify, as the transcription of her earlier statements was never actually offered in evidence by appellant. But see *Grayson v. State*, 684 S.W.2d 691 (Tex.Cr.App. 1984). Although the State shared appellant's view at trial that her privilege had been waived, it evidently did not agree that her remarks to the trial judge should be read to the jury, since no objection was interposed by the prosecutor when the judge denied appellant's motion to do so. It thus seems that the trial judge anticipated an objection from the State and prospectively sustained it.

Ordinarily, we would be disinclined to condone such behavior. Parties are bound to make their own objections, and

trial judges are usually expected to receive evidence against which no objection has been interposed. In this instance, however, appellant didn't attempt to offer his evidence in the usual way, as by calling a witness to his wife's declarations. As a consequence, counsel for the State wasn't afforded a fair opportunity to register his own objections, if any. Instead, appellant solicited prospective permission of the trial judge to have his wife's statements read to the jury by the court reporter. But because this testimony was not elicited in the jury's presence to begin with, reading it back before receiving it into evidence would have been improper. In short, appellant was obliged first to offer the evidence before complaining of its exclusion. Likewise, the State was not obliged to interpose an objection to evidence not actually tendered before the tier of fact. Under the present circumstances, therefore, we think it inappropriate to find error in the court's ruling. Appellant's twentieth point of error is overruled.

VI.

In four points of error, appellant complains of the receipt into evidence of twenty-three color photographs depicting from various angles and at various distances the murder scene and body of the deceased. He claims that these photographs were offered "solely to inflame the minds of the jury." *Martin v. State*, 475 S.W.2d 265, 267 (Tex.Cr.App. 1972). We have since recognized, however, that the admissibility of photographs with inflammatory potential is controlled by Texas Rule of Criminal Evidence 403, and have declared Martin defunct to the extent of any conflict. *Long v. State*, 823 S.W.2d 259, 271-272 (Tex.Cr.App. 1991). Still, the result in this case would be the same under either formulation.

We have examined the exhibits in question, and they do not impress us as unusually shocking or gruesome. Because appellant doesn't dispute their relevancy, we are unconvinced that the prejudice inherent in a visual representation of this dreadful crime necessarily outweighs as a matter of law its

acknowledged probative value. Tex.R.Crim.Ev. 403; *Rogers v. State*, 774 S.W.2d 247, 258 (Tex.Cr.App. 1989) ; *Williams v. State*, 773 S.W.2d 525, 539 (Tex.Cr.App. 1988). Accordingly, the trial judge was within the ambit of his discretion to admit the photographs.

Appellant's points of error twenty-one through twenty-four, inclusive, are overruled.

VII.

Points twenty-five through thirty-four declare that appellant's arrest and the subsequent search of his automobile were unlawful, that the ordnance seized as a result should have been suppressed, and that color photographs of the car, the weapons, and the scene were likewise inadmissible. See U.S. Const., Amend. 4; Tex.Const. Art. 1, Sec. 9.

When investigation of the murder in this case cast suspicion on appellant, a warrant was issued for his arrest and for a search of his Irving residence. It was then discovered that he had gone to Houston and was residing with an acquaintance there. Accordingly, Dallas authorities advised Harris County by teletype that appellant was wanted on a murder warrant in Irving.

Based on this information, agents of the Houston Police Department (HPD) and of the United States Bureau of Alcohol, Tobacco, and Firearms sought a search warrant for the residence of appellant's Houston acquaintance, including another warrant for appellant's arrest. While the site was surrounded, appellant and his friend arrived in a white Cadillac Seville. After depositing his companion and the latter's young children at the house, appellant noticed approaching law enforcement officers. Evidently in an attempt to escape, he backed from the driveway and spun the car quickly around, but his egress was blocked by a police vehicle. Brandishing a pistol, he sprang from the car, was shot by an HPD marksman and then arrested.

Appellant insists that his arrest was in fact made under authority of the Harris County warrant, which was invalid because issued only after he was actually taken into custody. But we need not pass upon validity of the Harris County warrant as Houston police officers were authorized to arrest appellant pursuant to the Dallas warrant of which they had been informed. The legality of their conduct in reliance on this warrant did not depend, as appellant mistakenly contends, upon their actual possession of the document. Art. 15.26, V.A.C.C.P.; Bradley v. State, 478 S.W.2d 527, 530 (Tex.Cr.App. 1972); *Cook v. State*, 470 S.W.2d 898, 899 (Tex.Cr.App. 1971). Rather, they were fully empowered to arrest him on notice of the outstanding warrant received electronically from Dallas law enforcement authorities. C f. Art. 15.08, V.A.C.C.P. Any weapons and ammunition taken at that time from his person or from places in the immediate vicinity were, of course, seized pursuant to a lawful arrest and not subject to suppression on the grounds he now urges. New York v. Belton, 453 U.S. 454 (1981).

As for items obtained from within the Cadillac, especially weapons found in the trunk, the record reflects that the car was owned by appellant's companion, who voluntarily consented to its search by law enforcement officers. *See United States v. Matlock*, 415 U.S. 164 (1974); *Sharp v. State*, 707 S.W.2d 611, 617 (Tex.Cr.App. 1986); *Williams v. State*, 621 S.W.2d 609, 613 (Tex. Cr.App. 1981) (panel opinion). Cf. *Bumper v. North Carolina*, 391 U.S. 543 (1968).

Points of error twenty-five through thirty-four, inclusive, are overruled.

VIII.

Next, appellant maintains that the court's charge to the jury erroneously failed to restrict consideration of extraneous offenses to the limited purpose for which they were proven.

When evidence is received for a limited purpose the jury should, of course, be instructed as to the limitation, at least upon timely request of an affected party. Tex.R.Crim.Ev. 105 (a). Most often such limitation is sought because the evidence is relevant, not only to the issue for which it was received, but also to some other issue upon which it was not admissible and concerning which it might therefore be unfairly prejudicial. See Tex.R.Crim.Ev. 403. Proof of an extraneous offense is almost invariably admissible at the guilt/ innocence phase of trial only insofar as it illuminates a material issue in the case, *Crank v. State*, 761 S.W.2d 328, 340-345 (Tex.Cr.App. 1988). It is never admissible merely to encourage the inference that an accused is likely to be guilty solely because he committed other crimes in the past. Tex.R.Crim.Ev. 404 (b). E. g.-, *Williams v. State*, 662 S.W.2d 344 (Tex.Cr.App. 1983).

In the instant cause the trial judge overruled appellant's objection to the admission of extraneous offenses without requiring the State to indicate the purpose for which it offered the evidence. Whether the judge erred in this respect, either by overruling appellant's objection or by failing to specify the limited purpose for which the evidence was received, is not a question upon which appellant has sought review in this Court. Rather, he complains only that the court's charge on extraneous offenses failed to limit the jury's consideration of such evidence to the purpose for which it was received.

Since it appears from the record that such evidence was in fact received, whether rightly or wrongly, for general purposes, the jury was thus entitled to consider it upon any issue to which it was relevant, without limitation. Tex.R.Crim.Ev. 105 (a); *Richardson v. State*, 786 S.W.2d 335, 337-338 (Tex.Cr.App. 1990); *Cantrell v. State*, 731 S.W.2d 84, 94-95 (Tex.Cr.App. 1987). Accordingly, the trial judge did not err in overruling appellant's objection.

Point of error thirty-five is overruled.

IX.

Finally, appellant asserts that four prospective jurors were excluded for cause on motion of the State because of their opposition to capital punishment, in violation of the United States Constitution. *Wainwright v. Witt*, 469 U.S. 412 (1985); *Adrams v. Texas*, 448 U.S. 38 (1980) ; Witherspoon Illinois, 391 U.S. 510 (1968). An examination of the record discloses that, while not all of these veniremembers were opposed to the death penalty in principle, all were opposed for reasons of conscience or religion to serving as jurors in a case where the death penalty might be assessed.

We have held that capital veniremembers, even if willing and able honestly to answer the special punishment issues, may be challenged for cause if they would opt to refuse the oath of a juror and thereby disqualify themselves from jury service on account of personal aversion to assessing the death penalty. *Goodwin v. State*, 799 S.W.2d 719, 733-734 (Tex.Cr.App. 1990); *Ellis v. State*, 726 S.W.2d 39, 41-44 (Tex.Cr.App. 1986). Cf. Fe *Felder v. State*, 758 S.W.2d 760, 765-766 (Tex.Cr.App. 1988). *Contra Hernandez* , 757 S.W.2d at 753. The record in this cause rather clearly reflects that each of the prospective jurors whose exclusion is at issue here chose to exercise that option.

Appellant's thirty-sixth point of error is, therefore, overruled.

Finding no reversible error in the complaints assigned for review, we affirm appellant's conviction and sentence of death.

PER CURIAM

EN BANC

DELIVERED: September 16, 1992

DO NOT PUBLISH

Overstreet, J., concurs in the result Clinton, J., dissents

Baird and Maloney, JJ, not participating

APPENDIX A

POINTS OF ERROR ONE THROUGH SEVEN:

Boseman: *Venireman* #7

State's justification for peremptory strike included the venireman's testimony regarding the death penalty and his possible hesitation in giving such a sentence. Support is found in the record where Boseman testified he agreed with the death penalty but could not serve on a capital murder jury (Voir Dire Vol. I-282). Also, he testified that if he felt that the defendant should not be executed, he could not answer the three punishment issues yes even though the evidence supported affirmative answers (Voir Dire Vol. I-300 through 301).

Fields: *Venireman* #9

State's justification for peremptory strike included the venireman's testimony regarding rehabilitation, religious beliefs, and the fact his brother had been convicted of a felony. Support is found in the record where Fields testified that the death penalty was only appropriate when a person could not be rehabilitated and it was his belief that anyone could be rehabilitated who found God (Voir Dire Vol. I-423). Also, Fields testified his religion's doctrinal views opposed the death penalty though this was not his personal opinion (Voir Dire Vol. I-404 through 405).

Warren: *Venireman* #28

Justification for the peremptory strike included Warren's misgivings about the death penalty (Supp. Hearing Vol. I-29 through 31). The record indicates that Warren had mixed feelings about the death penalty serving a purpose (Voir Dire Vol. III-1532). In addition, he did not agree with the death penalty in all cases (Voir Dire Vol. III-1526). The state also noted that the strike of Mr. Warren came at a time when they

had numerous peremptory strikes remaining and could utilize them with less caution.

Rand: *Venireman* #37

State's justification for peremptory strike included Rand's "today I say I can, but tomorrow I might not" (Voir Dire Vol. IV-2008).

Boggess: *Venireman* #40

State's justification for peremptory strike includes Boggess' reluctance to sit on a capital murder jury (reflected in record at Voir Dire Vol. IV-2008) as well as the fact she had been a defense witness for her nephew at one time.

Kennedy: *Venireman* 43

State's justification for peremptory strike included Kennedy's belief that in a capital murder case involving a normal robbery, the death penalty was inappropriate and that it is only appropriate in mass murder situations (Voir Dire Vol. 2176 through 2178).

Baker: *Venireman* 71

State's justification for peremptory strike involved Baker's dislike for the death penalty and her inability to sentence another human to death (Voir Dire Vol. VIII-2990 through 2991). The State also noted that her antagonistic attitude towards the prosecuting attorney was a factor.

APPENDIX B

POINTS OF ERROR EIGHT THROUGH SIXTEEN:
Weigant: *Venireman* #6

Defense objected to Weigant's views regarding the death penalty. Weigant testified that his personal view was the death penalty should be used for any intentional murder. However, he specifically stated he would follow the law and would not impose his personal view upon the defendant (Voir

Dire Vol. I-204 through 205). Defense also questioned whether he was capable of assessing the minimum punishment for murder. In this regard, he specifically. stated he would vote for the five year minimum if the facts of the case warranted it (Voir Dire Vol. I-247 through 249).

Jenkins: *Venireman* 21

Defense objected to Jenkins' inability to assess the minimum penalty in a murder case. However, Jenkins specifically stated that if the evidence proved that the minimum sentence was warranted, she would give that sentence (Voir Dire Vol. III-1126).

Smale: *Venireman* #24

Defense objected due to Smale's inability to give the minimum sentence for murder as well as her view that she would be unable to answer any of the three punishment related questions in the negative if the defendant were found guilty of capital murder. However, during questioning by the court, she specifically stated that she would assess the minimum penalty for murder if the evidence showed that it was appropriate (Voir Dire Vol. III-1324 through 2326). She also specifically stated that she could answer one or more of the punishment questions in the negative based upon the evidence and they were not automatic "yes" votes (Voir Dire Vol. III-1336 through 1337).

Nix: *Venireman* #48

Defense objected due to Nix's inability to consider the minimum punishment for murder. However, she specifically stated that she would assess punishment at five years if she thought that it was appropriate based upon the evidence presented (Voir Dire Vol. V-2396).

Walters: *Venireman* X79

Defense objected due to Walters' belief that she would automatically answer yes to all three punishment questions if

the defendant was found guilty of capital murder. However, under questioning from the court, Walters testified that the state would have to prove that the answers to the questions were yes; if they were not proven, then she would answer in the negative (Voir Dire Vol. VIII-3393 through 3394).

Davis: *Venireman* #82

Defense objected to Davis' inability to assess the minimum punishment for murder. However, Davis did specifically say she could vote for the minimum penalty of five years if the evidence warranted such a sentence though she had trouble imagining such a situation (Voir Dire Vol. IX-3496 through 3497).

Spence: *Venireman* #85

Defense objected to Spence because he presumed the defendant had done something wrong by virtue of his being tried for capital murder. In this regard, Spence testified that an indictment did not satisfy him beyond a reasonable doubt and that he would not consider the indictment as evidence against the defendant (Voir Dire Vol. IX-3567 through 3570). Defense also questioned Spence's ability to assess the minimum penalty for murder. Spence, however, specifically stated he would keep an open mind about punishment and would assess the minimum punishment if warranted (Voir Dire Vol. IX-3534 through 3535).

Jones: *Venireman* #103

Defense objected to Jones' inability to consider the minimum punishment for murder. Jones did testify that he believed the punishment for any murder should be mandatory death and that this would make it easier for him to assess the maximum rather than the minimum penalty. However, he specifically stated he would put these personal views behind him and would consider the minimum penalty if the evidence supported it. (Voir Dire Vol. XI-4217 through 4220).

O'Dell: *Venireman* #107

Defense objected to O'Dell due to his inability to consider the minimum penalty for murder. However, he specifically stated he could consider a punishment of five years for murder in the proper case and proper circumstances (Voir Dire Vol. XI-4511 through 4512).

Hearne: *Venireman* #108

Defense objected to Hearne's bias towards police officers, her bias against psychiatrists, and her testimony that she would change her opinion of guilt or innocence if she were the only dissenting vote on the jury. However, she testified she would not give more credibility to a police officer than any other witness (Voir Dire Vol. XI-4622). She also testified her objection to psychiatrists was only in her belief that there were certain things which could not be proven. She specifically stated she would believe a psychiatrist was telling the truth to the best of his ability (Voir Dire Vol. XI-4627 through 4628). Finally, when questioned by the court, Hearne testified she would change her opinion only if convinced by the other jurors that her initial position was incorrect (Voir Dire Vol. n-4636).

* * * *

No. 69,677

THOMAS JOE MILLER-EL,
Appellant,

vs.

THE STATE OF TEXAS,
Appellee.

APPEAL FROM DALLAS COUNTY

AFFIRMED.

OPINION BY
PER CURIAM

Judge

EN BANC

DO NOT PUBLISH

Overstreet, J., concurs in the result

Clinton, J., dissents

Baird and Maloney JJ, not participating

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. 3-96-cv-1992-H

THOMAS JOE MILLER-EL
Petitioner,

vs.

GARY JOHNSON, Director Texas Department of Criminal Justice, Institutional Division
Respondent.

FINDINGS AND RECOMMENDATION
OF THE UNTIED STATES MAGISTRATE JUDGE

This case has been referred to the United States magistrate judge pursuant to 28 U.S.C. § 636(b) and an order of reference from the district court. The findings and recommendation of the magistrate judge are as follow:

I.

PROCEDURAL BACKGROUND

Petitioner Thomas Joe Miller-El was convicted of capital murder and sentenced to death. His conviction and sentence were affirmed on direct appeal. *Miller-El v. State*, No. 69,677 (Tex. Crim. App. September 16, 1992), cert. denied, 114 S. Ct. 100 (1993). Petitioner also filed an application for writ of habeas corpus in state court. The trial judge made written findings and recommended that the application be dewed. The Texas Court of Criminal Appeals denied habeas relief in an unpublished opinion. Ex parse Miller-El, No. 31,001 (Tex. Crim. App. June 17, 1996). Petitioner then tiled this action in federal court.

ISSUES PRESSENTED

Petitioner raises four issues in six grounds for relief. He contends that: (1) the prosecution exercised its peremptory challenges in a racially discriminatory manner; (2) a prospective juror was improperly struck for cause; (3) the trial court failed to conduct a competency hearing and allowed the trial to proceed despite the fact that he was incompetent; and (4) the prosecutor improperly referred to his religious affiliation during sentencing.

III.

STANDARD OF REVIEW

The standard of review in federal habeas proceedings is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA"). Antiterrorism and Effective Death Penalty Act, Pub.L. No. 104-132, 110 Stat. 1214 (1996). The AEDPA establishes specific standards and procedures for reviewing death penalty habeas cases. See 28 U.S.C. §§ 2661-2266. These rules apply to all capital cases pending on or after the effective date of the AEDPA, provided the state has established a mechanism for the "appointment, compensation, and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings." Id. § 2261(a), (b) & (c). Texas does not yet meet these "opt-in" requirements. *Carter v. Johnson*, 110 F. 3d 1098, 1104 (5th Cir.), vacated on other grounds, 118 S.Ct. 409 (1997). Therefore, the Court must look to the general standards of review under the AEDPA.

A federal court may not grant habeas relief with respect to any claim that was adjudicated on the merits in a state court proceeding unless petitioner shows that the prior adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the

evidence presented in the state court. 28 U.S.C. § 2254(4). A State court decision is not "contrary to clearly established federal law" unless a different result was dictated by existing Supreme Court precedent. *Drinkard v. Johnson*, 97 F.3d 751, 768 (5th Cir. 1996), *cert denied*, 117 S.Ct. 1114 (1997). A state fact finding is not "unreasonable" unless the petitioner can rebut the finding by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). An application of law to facts is not "unreasonable" unless "[the] state court decision is so clearly incorrect that it would not be debatable among reasonable jurists." *Drinkard*, 97 F.3d at 769.[3]

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[3] Petitioner argues that Drinkard misinterpreted the standard of review for federal habeas cases under 28 U.S.C. § 2254(4)(1). The Drinkand court held that the first clause of the statute-prohibiting habeas relief unless the state court adjudication resulted in a decision that was 'contrary to" clearly established federal law—applies only to questions of pure law. Under this interpretation, a federal court cannot grant habeas relief unless the state court failed to identify the correct rule of law when it adjudicated the claim. Drinkard, 97 F.3d at 767-68. Petitioner advocates a different interpretation of the "contrary to" clause. He suggests that the proper inquiry should be whether the Supreme Court had announced a controlling rule of law prior to the time the claim was adjudicated in state court. If so, a federal habeas court must decide whether the state court decision is "contrary to" that established law. Otherwise, the 'unreasonable application" clause of the statute comes into play and the federal court must determine whether the state court adjudication was untenable under existing Supreme Court authority. (Pet. Reply at 13-17).

In sum, petitioner maintains that there is no basis for the distinction in the standard of review for "pure legal questions" and "mixed questions of law and fact" under the AEDPA. Both should be subject to review under the 'unreasonable application" clause of section 2254(4)(1) where there is no Supreme Court authority directly on point. (*Id.*). *See Drinkard*, 97 F.3d at 778-79 (E. Garza, J., dissenting). Moreover, petitioner contends that the court's interpretation of the "unreasonable application" clause—making habeas relief available "only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists"—raises serious problems under Article III and the Suspension Clause of the U.S. Constitution. (Pet. Reply at 20). These are thoughtful and provocative

PEREMPTORY CHALLENGES
(Grounds 1 & 2)

In two related grounds for relief, petitioner argues that the prosecution used 10 of its 14 peremptory challenges to exclude African-Americans from jury service in violation of the equal protection clause of the Fourteenth Amendment.

A. Applicable Law

The Fourteenth Amendment guarantees every defendant in a criminal case equal protection under the law. *Hernandez. v. State*, 347 U.S. 475, 477, 74 S.Ct. 667, 670, 98 L.Ed. 866 (1954). This right extends to the jury selection process. *Swain v. Alabama*, 380 U.S. 202, 204, 85 S .Ct. 824, 826,13 L.Ed.2d 759 (1965); *Strauder v. West Virginia*, 10 Otto 303,100 U.S. 303, 305-08, 25 L.Ed. 664 (1879). Thus, a prosecutor may not use his allotted peremptory challenges to exclude potential jurors solely on the basis of their race. *Swain*, 85 S.Ct. at 837-38. Prior to the Batson decision in 1986, the use of peremptory strikes against minorities in any single case was not unconstitutional. Id. at 836-37. Rather, a defendant was required to demonstrate a historical pattern of racial bias in the selection of juries. Id. at 837-38. The Fifth Circuit explained this burden as follows:

> In order to prevail [on a Swain claim], [petitioner] must prove that his prosecutor "had a systematic and intentional practice of excluding blacks from traverse juries in criminal trials through the exercise of peremptory challenges, and that this practice continued unabated through petitioner's trial."

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arguments. Nevertheless, this Court is bound by the Drinkard majority and must follow its holding. *See Cedillo v. Valcar Enterprises of Darling Delaware Co.*, 773 F.Supp. 932, 936 (N.D. Tex. 1991) (district court is bound by Fifth Circuit precedent)

Evans v. Gab, 821 F.2d 1065, 1068 (5th Cir.), *cert. denied*, 108 S.Ct. 5 (1987), quoting *Willis v. Zant*, 720 F.2d 1212, 1220 (11th Cir.1983), *cert. denied*, 104 S.Ct. 3548 (1984) (emphasis in original). Absent evidence of purposeful and systematic discrimination, the prosecutor was entitled to a presumption that he used his peremptory stakes in a proper manner. *Swain*, 85 S.Ct. at 837.

The Supreme Court revisited this issue twenty years later in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Recognizing that it was often impossible for a defendant to prove the systematic exclusion of minorities from jury service over an extended period of time, the Court rejected this evidentiary formulation "as inconsistent with standards that have been developed since Swain for assessing a prima facie case under the Equal Protection Clause." *Id.*, 106 S.Ct. at 1721.[4] No longer were defendants required to establish a historical pattern of discrimination in the use of peremptory stakes. Batson held that 'a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case." *Id.* at 1722 (emphasis in original).

A proper *Batson* challenge has three elements. First, the defendant must raise an inference that the prosecutor excluded potential jurors solely on the basis of race. Id. at 1723; *United States v. Wallace*, 32 F.3d 921, 925 (5th Cir.1994). A defendant may satisfy this burden in a variety of

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[4] The Supreme Court observed that the "crippling burden" imposed by Swain rendered the prosecution's use of peremptory challenges "largely immune from constitutional scrutiny." Batson, 106 S.O. at 1721. Indeed, this Court has found only two reported cases in which Swain relief was granted. *See State v. Washington*, 375 So.2d 1162 (La. 1979); *State v. Brown*, 371 5o.2d 751(La. 1979). Both cases involved the same prosecutor who essentially admitted that he systematically struck African-Americans from jury service. Washington, 375 So.2d at 1163-64.

ways, such as showing a pattern of strikes against minority jurors on the venire panel or statements made by the prosecutor during the voir dire examination. *Batson*, 106 S.Ct. at 1723. Once the defendant makes a prima facie case, the burden shifts to the prosecution to articulate a race-neutral explanation for each of the challenged strikes. *Id.* at 1723-24; *Wallace*, 32 F.3d at 925. This inquiry focuses on the facial validity of the proffered explanation. "Unless discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral." *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995) (citations omitted); see also *United States v. Perkins*, 105 F.3d 976, 978 (5th Cir. 1997). The trial court then determines whether the defendant has proven purposeful discrimination. Batson,106 S.Ct. at 1724; *Wallace*, 32 F.3d at 925.

When the record contains an explanation for the prosecutor's use of peremptory challenges, the reviewing court need only decide the propriety of the ultimate finding of discrimination.

Perkins, 105 F.3d at 978; *United States v. Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987). This finding is entitled to great deference because it largely turns on an evaluation of the credibility or demeanor of the attorney who exercises the challenge. *Hernandez v. New York*, 500 U.S. 352, 363,111 S.Ct.1859,1869,114 L.Ed.2d 395 (1991); *United Sates v. Beruley-Smith*, 2 F.3d 1368, 1373 (5th Cir. 1993). In a federal habeas case, such a finding will not be disturbed "unless it constitutes an unreasonable determination of the facts in light of the evidence presented in the prior state court proceeding." 28 U.S.C. § 2254(4)(2); *see also Carter*,110 F. 3d at 1104.

B. State Court Proceeding

Petitioner, an African-American, was charged with intentionally causing, the death of a hotel clerk during the course of a robbery. The state sought the death penalty. Jury

selection began on February 3, 1986 and continued through March 5, 1986. The original venire consisted of 108 prospective jurors, including 18 African-Americans. Six of the African-American jurors were excused by agreement of the parties and one was struck for cause.[5] Both sides were then allowed 15 peremptory challenges. The prosecution used 10 strikes against African-Americans. The defense exercised all 15 of its challenges against non-minorities. One African-American was seated on the jury.[6]

On March 9,1986—just four days after the jury was empaneled—the Dallas Morning News ran a front-page story about jury selection practices in Dallas County criminal cases. See Steve McGonigle & Ed Timms, *Race Bias Peruades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds*, DALLAS MORNING NEWS, March 9, 1986 at Al. (Am. Petition, Exh. 3). The newspaper article examined the racial and ethnic composition of juries in 100 randomly selected felony trials between 1983 and 1984. Of 467 African-American jurors qualified to serve in those cases, 405 were peremptorily challenged by the state. The study found that African-Americans were five-times more likely to be removed from a jury panel than whites, and twice as likely to

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[5] The record shows that petitioner agreed to excuse Hilbert Gitchaway, Dora Randle, Vergie Miller, Jerry W. Moseley, Lourice Collier, and Jobnnie Holma. (Pet. Supp. Brief, App. 1 at 60). Virginia Smith was struck for cause because of her views on the death penalty. (SF Voir Dire-II 1006).

[6] The only African-American not challenged by the prosecution, Troy L. Woods, was the quintessential state's juror. When asked about his feelings on capital punishment, Woods stated:

> It's too quick. They don't feel the pain , . . Well, what I call punishment is back to the old Indian days. Pour some honey on them and stake them out over an ant bed. That's the way I feet about it. That's what I call punishment.

(SF Voir Dirc-K 3848).

be struck as Hispanics. Indeed, 70 of the 100 trials studied during the relevant time period had no African-Americana jurors at all.[7]

This article prompted defense counsel to file a motion to quash the jury panel. The motion was heard on March 12, 1986. At the hearing, petitioner attempted to show that the Dallas County District Attorney's office had an "unofficial policy" of excluding African-Americans from jury service. This policy dated back to the late 1950s, but was still being followed by some prosecutors at the time of petitioner's trial. Five current or former judges, two. prosecutors, and two defense lawyers testified at the hearing.[8] One witness, former

[7] The same authors also studied 15 capital murder trials in Dallas County between 1980 and 1986. See Ed Timms & Steve McGonigle, A Pattern of Exclusion: Blacks Rejected from Juries in Capital Cases, DALLAS MORNING NEWS, Dec. 21, 1986 at A1. (Am. Petition, Exh.10). Of 62 African-Americans qualified to serve as jurors in those cases, 56 were struck by the state with peremptory challenges. Only five African Americans served on capital murder juries during this time period. While five of the 15 cases involved African-American defendants, four of those defendants were tried by all-white juries. Ironically, petitioner was the only African-American defendant to have a trial before at least one member of his own race.

[8] Among the witnesses to testify at the hearing was Jack Hampton, presiding judge of the 283rd Judicial District Court. Judge Hampton served as an Assistant District Attorney in the late 1950s. He recalled being reprimanded by District Attorney Henry Wade after allowing an African-American woman to serve on a jury in a DWI case. (SF-3/12186 Hrg. 59-60). Significantly, Wade still served as Dallas County District Attorney when petitioner was tried in March 1986.

Other witnesses testified about more recent incidents of purposeful discrimination against African-American jurors. Harold Entz, presiding judge of Dallas County Criminal Court No. 4, said that one of his prosecutors wanted to shuffle a jury panel "because a predominant number of the fast six, eight, or ten jurors were blacks." (*Id.* at 104). This occurred within the past "three or four years." (*Id.* at 103). Another judge, Ed Kinkeade, testified that he thought prosecutors had systematically excluded African-Americans from juries in his court. (*Id.* at

Assistant District Attorney Jon Sparling, testified about a memo he wrote in 1969 on jury selection in criminal cases. (SF-3/12/86 Hrg. 27-57 & Def. Exh. 1). This 19-page document is punctuated with racial, ethnic, religious, and gender-based stereotypes. For example, Sparling advises prosecutors that '[who you select, and what you qualify the panel on will depend on the type of crime, the age, color and sex of the (defendant . . ." (*Id.*, Def. Exh. 1 at 301) (emphasis added). He goes on to state that "[y]ou are not looking for any member of a minority group which may subject him to oppression" because "[m]inority races almost always empathize with the [d]efendant. (*Id.*, Def. Exh. I at 303, 305). Sparling testified that his memo was used to train misdemeanor prosecutors and became part of a manual distributed to all members of the Dallas County District Attorney's office. (*Id.* at 2930).

At the conclusion of the hearing, the trial judge found that there was "no evidence presented to me that indicated any systematic exclusion of blacks as a matter of policy by the District Attorney's office." (*Id.* at 146). He therefore concluded that petitioner haled to establish a Swain violation. (Vd.). The case proceeded to trial and petitioner was convicted of capital murder on March 26, 1986. One month later, the Supreme Court decided Batson.

On direct appeal, petitioner challenged the jury selection process under the more liberal Batson standard.[9] The Texas

112-13). This observation was confirmed by Judge Larry Baraka, who barred a prosecutor from conducting voir dire in his court after an incident in 1985. (*Id.* at 74-75, 77). Judge Baraka admitted that there had been "a systematic exclusion of blacks by the State from juries" in the past. However, he thought "things had improved considerably" since about 1980, (*Id.* at 75-76).

[9] The Supreme Court has held that Batson applies retroactively to cases pending on direct review at the time it was decided. *See Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987).

Court of Criminal Appeals found that petitioner had established an inference of purposeful discrimination because the prosecutor used "such a skewed number of strikes on the black veniremen" and "only a single black juror was seated on the panel." *Miller-El v. State*, 748 S.W.2d 459, 460 (Tex. Crim. App. 1988). However, the prosecutor was never given an opportunity to explain his use of peremptory challenges. The case was remanded to the trial court with instructions to conduct a *Batson* hearing. *Id.* at 460-61.

This hearing was held on May 10, 1988. Paul Macaluso, the prosecutor who conducted voir dire, testified as to his reasons for striking each of the 14 African-Americans from the jury panel. The trial court determined that these explanations were race-neutral and negated any inference of purposeful discrimination.[10] Specifically, the court found that: (1) none of the explanations given by the prosecutor were based on group traits; (2) none of the jurors were questioned perfunctorily; (3) there was no disparate examination of the jurors; and (4) the primary reason given to support each peremptory challenge, the juror's reluctance to assess the death penalty, was closely and directly related to the facts of the case. (Supp. Tr. at 6-7). Petitioner challenged these findings on direct appeal. However, the Texas Court of Criminal Appeals found that the prosecutor's explanations were not "patently implausible or so contrary to the evidence as to be unworthy of belief as a matter of law." *Miller-El v. State*, No. 69,677, op. at 2 (Tex. C rim. App. September 14, 1992) .

Consequently petitioner was able to raise this claim for the first time on appeal.

[10] The trial coot also found that petitioner failed to raise an inference of purposeful discrimination through the state's use of peremptory challenges. (Supp. Tr. at 4). However, this finding appears to be contrary to the decision of the Texas Court of Criminal Appeals. See Miller-El, 748 S.W.2d at 460 ("We find that appellant has established an inference as required by the Batson court.")

C. *Swain* Claim

Petitioner seeks federal habeas relief under both *Swain* and *Batson*. He argues that these cases have distinct applications and provide independent grounds for challenging discriminatory a jury selection practices. Petitioner urges this dichotomy so he can cake advantage of dicta in Swain analogizing a Fourteenth Amendment equal protection case to a Sixth Amendment fair cross-section claim once a *prima facie* showing of systematic discrimination has been made.[11] Since such evidence was presented in this case, petitioner maintains that he is entitled to an inference that the prosecutor used his peremptory challenges in a racially discriminatory manner.

This argument fails for several reasons. First, petitioner misreads *Swain*. While recognizing that "global exclusion of Negroes by the state officers responsible for selecting names of jurors gives rise to a fair inference of discrimination on their part," the Supreme Court held that "this rule of proof cannot be woodenly applied to cases where the discrimination is said to occur during the process of peremptory challenge of persons called for jury service." *Swain*, 85 S.Ct. at 839. The Court went on to explain:

> Unlike the selection process, which is wholly in the hands of state officers, defense counsel participate in the peremptory challenge system, and indeed generally have a far greater role than any officers of the State. It is for this reason that a showing that Negroes have not served during a specified period of time does not, absent a sufficient showing of the prosecutor's participation, give

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[11] The Sixth Amendment guarantees a defendant the right to trial by an impartial jury "drawn from a fair cross-section of the community.") *Taylor v. Louisiana*, 419 U,S. 522, 536, 95 S.Ct. 692, 700, 42 L.Ed.2d 690 (1975).

rise to the inference of systematic discrimination on the part of the State.

Id. Thus, *Swain* rejected any analogy to fair cross-section cases without proof that the prosecutor systematically. used peremptory strikes against minorities over a period of time. Id. at 839-40. Historical evidence, standing alone, was never enough to prove a Swain violation.

Nor is there any authority for the proposition that *Swain* somehow survives *Batson*. In fact, Batson specifically overruled *Swain*. *Batson*, 106 S . Ct. at 1725 n.25 ("To the extent that anything in [*Swain*] is contrary to the principles we articulate today, that decision is overruled. "). Moreover, the two cases are wholly complementary with regard to their treatment of historical evidence. Under *Swain*, a defendant was required to prove systematic discrimination as a prerequisite to an equal protection claim. *Swain*, 85 S.Ct. at 837-38. This requirement was abolished in *Batson*. *Batson*, lob S.Ct. at 1722. However, historical evidence can still be used to establish a *prima facie* case of discrimination in the jury selection process. Id. at 1721-22. A defendant may show that the prosecutor in his case had a practice of striking minority jurors over a period of time. It then becomes incumbent upon the prosecutor to explain his use of peremptory challenges in light of that fact. Regardless of the type of evidence presented, the standard of proof remains the same. It makes no difference whether the defendant's *prima facie* case is based on historical evidence or the actions of the prosecutor at trial. The court must consider the "totality of relevant facts in determining whether purposeful discrimination exists in any particular case.

Finally, the Supreme Court has held that a defendant may not challenge the composition of a petit jury on the grounds that it does not represent a fair cross-section of the community. *Holland v. Illinois*, 493 U.S. 474, 487,110 S.Ct. 803, 811, 107 L.Ed.2d 905 (1990). Rather, such a claim

applies only to the venire from which the jury is ultimately selected. *Id.*, 110 S. Ct. at 807. It therefore follows that the standards governing a fair cross-section claim under the Sixth Amendment are not applicable to an equal protection claim under the Fourteenth Amendment. *Cf. id.* at 806 (rejecting invitation to extend Batson standards to Sixth Amendment fair cross-section claims).

The Court concludes that *Swain* does not provide an independent basis for challenging the prosecutor's use of peremptory challenges in this case. Petitioner's equal protection claim must be analyzed under the standard of proof articulated in *Batson*.

D. *Batson* Claim

Petitioner characterizes the evidence supporting his equal protection claim as "copious and multifaceted." (Am. Petition at 15). This is an understatement. His amended petition contains 202 pages of argument on this point, with citations to numerous state and federal authorities. Succinctly stated, petitioner contends that the jury selection practices employed by the state in his case were unconstitutional because: (1) the prosecutors had a documented history of using peremptory challenges against minorities in other cases; (2) African-American jurors were subjected to disparate questioning on the issue of minimum punishment; and (3) the state accepted non minority jurors with the same characteristics as African-Americans who were struck by the prosecution. A brief discussion of these arguments, none of which were presented to the state court, is necessary to the disposition of this claim.[12]

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[12] The Court asked the parties to brief the issue of whether petitioner fairly presented the factual basis of his "improper questioning" and "comparative juror analysis" claims in state court. *See* ORDER, 7128199. Respondent conceded that these arguments "are subsumed within the broad Batson issue and are not tantamount to the presentation of a new

1. Other Cases

Petitioner maintains that two of the prosecutors in his case, Paul Macaluso and Jim Nelson, "had a history of discriminating against African Americans in jury selection and that this practice continued at his trial." (Am. Petition at 59). As proof of discriminatory intent, he cites two other cases involving the same prosecutors. *Chambers v. State*, 784 S.W.2d 29 (Tex. Crim. App. 1989), *cert. denied*, 110 S.Ct. 2602 (1990); *Dorothy Jean Miller-El v. State*, 790 S.W.2d 351 (Tex. App.-Dallas 1990, pet. ref d).[13] Both cases were reversed for *Batson* violations. Even assuming that this evidence constitutes a pattern of systematic discrimination, it is only relevant in determining whether petitioner has established a prima facie case under Batson. The state court already found that petitioner has met this burden. Miller-El, 748 S.W.2d at 460. Consequently, the focus shifts to the explanation proffered by the prosecution for its use of peremptory challenges. Historical evidence is of limited value in assessing whether the race-neutral explanations articulated by the prosecutor were a pretext for discrimination in this case.

2. Improper Questioning

Petitioner also contends that all African-American jurors were subjected to disparate questioning on the issue of minimum punishment. He points out that non-minority "pro-death penalty" jurors were fully informed of the range of punishment for murder and asked whether they could keep an open mind on the subject. However, the prosecutor posed the same question to nonminority "anti-death penalty" jurors and. all African-American jurors in an open-ended manner. These

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claim." (Resp. Supp. Brief at 2). Therefore, the Court will consider these claims on the merits.

[13] Dorothy Jean Miller-El is petitioner's wife. She was convicted of murder and attempted capital murder in a separate trial.

jurors were asked, "What do you personally feel ought to be the minimum punishment for somebody committing a murder?" (SF Voir Dire-I 307-17). Most of the jurors responded with sentences well in excess of the statutory minimum of five years. When the prosecutor informed the jurors of the actual range of punishment, many felt that the minimum sentence was too lenient. As a result, they effectively disqualified themselves from serving on the jury.[14]

Obviously, petitioner intends to show that the prosecutors were of a mind to discriminate. However, no African-American jurors were peremptorily challenged because of their views on minimum punishment. Nor were any African-Americans struck for cause on that basis. Once again, the relevant inquiry in this case is whether the race-neutral explanations proffered by the state for its use of peremptory challenges were pretextual. If those reasons withstand scrutiny, there is no equal protection violation. Any evidence about the prosecutor's motivation for asking a question that did not form the basis of a peremptory challenge is simply irrelevant.

3. Comparative Juror Analysis

The prosecutor explained that he struck nine African-American jurors because of their attitude toward the death penalty or their reluctance to serve on a death penalty jury.[15]

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[14] Texas law allows the prosecution to challenge a prospective juror who demonstrates 'bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment." TEX. CODE CRN. PROC. ANN. art. 35.16(b)(3) (Vernon 1989). Thus, the state may strike a juror who cannot agree to consider the minimum punishment. *Phillips v. Staie*, 701 S. W.2d 875, 884 (Tex. Crim. App. 1985), *cert. denied*; 106 S.Ct. 3285 (1986).

[15] Petitioner admits that four African-American jurors—Linda C. Baker, Anna L. Keeton, Paul Bailey, and larnice Mackey—were properly challenged because of their extreme reluctance to serve on a death penalty jury. (Arn. Petition at 135 n.52).

Another African-American was struck because of her views on rehabilitation. Petitioner contends that these explanations were pretextual because non-minorities with the same or similar characteristics were accepted by the state. Consideration of this argument requires a careful review of the voir due examination of each challenged juror.

a. Juror Bozeman

Roderick Bozeman was the seventh juror on the venire panel and the first AfricanAmerican questioned. Bozetnan said that he believed in capital punishment, but might have a problem sitting on a death penalty jury. (Id. at 282). When asked to explain his answer, Bozeman stated:

> It would be actually the weight of, I guess, thinking about the death penalty and that would be the real thing behind it, I guess. I wouldn't have any problem serving on the jury, I don't think.

(*Id.* at 284). The prosecutor then inquired whether Bozeman could answer the special issues on punishment based solely on the evidence presented at trial, knowing full well that [it might] result in the execution of somebody who you personally don't desire to be executed." (*Id.* at 301).1[16]

[16] Three special issues are submitted to the jury at the conclusion of the punishment phase of a capital murder trial. These questions are:

> (1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> (2) whether there is a reasonable probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?
>
> (3) whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased?

Bozeman responded:

> I don't know. I would like to think I could, but I don't think I could. If I didn't feel like he deserved it, I don't think I could go for the death penalty.

(*Id.*). A short time later, Bowman changed his answer. He said, "I'd have to vote with the proof, you know, no matter how I felt. If the answer was yes, then I would have to put yes no matter how I felt about it." (*Id.* at 306). The prosecutor struck Bozeman based on his "feelings on the death penalty" and his "obvious hesitation." (*Id.* at 323).

Petitioner contends that these reasons were pretextual because five non-minority jurors accepted by the prosecution also had misgivings about the death penalty or their ability to serve on the jury.[17] However, such a subjective consideration is not easily assessed from a cold record. *See United States v. Aston*, 895 F.2d 1362, 1367 n.5 (11th Cir.1990) ("The attributes relied upon by the prosecutor in striking potential jurors are not always easily compared . . . and often 'require an evaluation of the degree to which the prospective juror manifests the stated attribute.").

Disparate treatment cannot automatically be imputed in every situation where the state rejects one juror with the same characteristics as another juror who is accepted. Indeed, the decision to strike a particular juror "may be influenced by intuitive assumptions that are not fatally suspect merely because they are not quantifiable." *United Stases v. Lance*, 853 F.2d 1177, 1181 (5th Cir. 1988). *See also Matthews v.*

TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(Vernon 1981). An affirmative finding on all three unanimous jury results in a death sentence. *Id.* art. 37.071(e).

[17] These jurors are identified as Noad O. Vickery, Ronald Salsini, Marie H. Mazza, Gwendolyn Smale, and loan Weiner. Ironically, petitioner struck Vickery, Salsini, and Smale. (Pet. Supp. Brief, App. 1 at 0059).

Evatt, 105 F. 3d 907, 918 (4th Cir.); *cert. denied*, 118 S.Ct. 102 (1997) (both prosecutor and defense counsel must be allowed to make credibility determinations when exercising peremptory challenges).

The record does not reflect the demeanor of Bozeman or the non-minority jurors who expressed doubts or hesitancy about the death penalty. The tone of voice, facial expressions, and other physical qualities of these juror all bear on the assessment of whether their hesitation was merely passing or more deeply-rooted. The trial judge personally observed the proceedings and accepted the prosecutor's explanation for striking Bozeman. The Court must defer to that credibility determination. *Hernandez*,111 S. Ct. at 1869; *Bentley-Smith*, 2 F.3d at 1373.

Nor is the fact that Bozeman later affirmed his ability to assess the death penalty necessarily dispositive. The use of peremptory challenges is often influenced by intuitive assumptions. Lance, 853 F.2d at 1181. The prosecutor is certainly allowed to conclude that a juror's initial indecision may not bode well for the state. *See Caldwell v. Maloney*, 159 F.3d 639, 655-56 (1st Cir.1998), *cert. denied*, 119 S.Ct.1152 (1999) ("[T]he prosecutor 'had no obligation either to ignore [the juror's comments about her reluctance] or to accept at face value [the juror's] prediction that, in the end, [she] could put aside [her] problem and do it right.'") (citation omitted). Such "gut reactions" are the essence of a peremptory challenge.

b. Juror. Fields

Billy Jean Fields was the second African-American juror struck by the state. A considerable portion of his voir dire examination focused on the special issue concerning future dangerousness. The prosecutor asked, "What sort of evidence do think would aid you . . . in deciding whether or not this is the type of individual that would probably do something of a

criminal nature again?" (SF Voir Dire 419). Fields responded that he would want information about the defendant's background. (*Id.* at 420, 422). The following colloquy then occurred:

> Q: [BY PROSECUTOR]. Let me just ask you briefly: What does that word probability mean to you in that connotation?
> A: [BY JUROR]: well, it means is there a possibility that he will continue to lead this type of life, will he be rehabilitated or does he intend to make this a life-long ambition.
> Q: Let me ask you, Mr. Fields, do you feel as though some people simply cannot be rehabilitated?
> A: No.
> Q:
> You think everyone can be rehabilitated?
> A: Yes.
> Q: I'm just curious. How would you ever know that there is somebody that—well, you said something earlier, but I can't remember exactly what it was, about whether or not somebody could be rehabilitated in conjunction with one of my questions earlier. You said that would tell you whether or not somebody could possibly be rehabilitated?
> A: Well, I think you're talking about the fact of whether or not it was premeditated. It may be far-fetched, but I feel like, if a person has the opportunity to really be talked about God and he commits himself, whereas he has committed this offense, then if he turns his life around, that is rehabilitation . . . . I feel like when an individual has really been truly reached by someone reading the word of God to him and they are repentant and they do have a real

act of contrition, they can be rehabilitated and that's been demonstrated.

F.2d at 1181.[18]

C. Juror Warren

The state used its sixth peremptory challenge against Joe Warren, another African-American member of the venire panel. When asked by the prosecutor whether he felt the death penalty accomplished a particular purpose, Warren responded:

> Yes and no. Sometimes I think it does and sometimes I think it don't. Sometimes you have mixed feelings about things like that.
>
> * * * *
>
> I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment.

(SF Voir Dire-III 1532). At the *Batson* hearing, the prosecutor cited this answer as one of the reasons for striking Warren. (SF-5110188 Hrg. 31). He went on to explain that "at that point in the voir dire examination with nine strikes remaining, we thought it would be best to exercise a peremptory challenge. We did not think he would be a favorable juror for the State." (*Id.* at 32).

[18] Petitioner argues that the other reason given by the prosecutor for striking Fields--that his brother had been convicted of a felony--was also pretcxtual. (SF Voir Dire4 455). The Court need not address this argument in light of upholding the validity of the prosecutor's first explanation.

Petitioner points out that two non-minorities who had mixed feelings about the death penalty were not struck by the prosecution.[19] However, these jurors were not sarly situated to Warren. After stating that life imprisonment might be a fate worse than death, both nonminority jurors frrnly asserted their belief that capital punishment was a deterrent to crime. (SF Voir Dire-III 3264-65; Voir Dire-VEI 1074-75). By contrast, Warren suggested that the death penalty might not serve any purpose. (Id. Voir Dire-III 1532). Clearly, his feelings on the subject were more ambivalent than the non-minority jurors accepted by the state. This indecision, coupled with the fact that the state still had nine peremptory strikes remaining, adequately supports the prosecutor's race-neutral explanation for challenging Warren.

d. Jurors Kennedy. Rand & Boggess

Three other African-American jurors—Wayman Kennedy, Edwin Rand, and Carrol S. Boggess-were struck by the prosecution because of their answers to certain questions about the death penalty. There is ample support in the record to support the exercise of these peremptory challenges.

All three jurors voiced concerns about sitting on a death penalty jury or imposing capital punishment in this type of case. Kennedy testified that the death penalty was only appropriate in °extreme cases . . . like a mass murder," and that a life sentence was sufficient for murder occurring during a robbery. (*Id.* Voir Dire-V 2176, 2178). He repeatedly refused to take a firm position on his ability to assess the death penalty until he heard the evidence. (Id. at 2182-94). Rand acknowledged that he had doubts about his ability to participate in assessing the death penalty. At first, he told the prosecutor that 'somewhere along the line, I would probably think to myself, you know, `Can I do this?' You know, right now I say I can, but tomorrow I might not." (*Id.* Voir Dire-

[19] These jurors are identified as Sandra Jenkins and Kevin Duke.

TV 1805-06). Later, Rand said that he could impose a death sentence if warranted by the evidence. (*Id.* at 1809-11). Boggess was even more direct. Although she would serve on the jury if selected, Boggess said that 'I wouldn't want to serve and I wouldn't want to have that responsibility to do that . . ." (*Id.* at 2008).

Petitioner argues that the views expressed by these African-American jurors were similar to those of non-minorities who were accepted by the state. However, the record does not support this assertion. None of the non-minority jurors identified by petitioner ever said that the death penalty was not appropriate for a murder committed during the course of a robbery or that they did not want to serve on the jury. Moreover, some of the African-American jurors were struck because of their reluctance or hesitancy in answering questions about the death penalty. These subjective qualities are best judged by the teal court. *See Hernandez*, 111 S.Ct. at 1869; *Bentley-Smith*, 2 F.3d at 1373.

4. Conclusion

Petitioner has adduced a considerable amount of evidence showing that the Dallas County District Attorney's office had an unofficial policy of excluding African-Americans from jury service in years past. There is no other explanation for the appalling statistics brought to light by the *Dallas Morning News* in March 1986. Several judges and defense lawyers confirmed that prosecutors often used peremptory challenges against African-Americans and other minorities for no apparent reason other than race. Then there is the "Sparling Memo"--the article on jury selection that taught Dallas County prosecutors to strike prospective jurors on the basis of race, religion, ethnicity, and gender. Although this evidence is disturbing, it is not dispositive of petitioner's *Batson* claim.

In order to prove an equal protection violation, - petitioner must show that the prosecutor used peremptory challenges to

purposefully exclude African-Americans from the jury in *his* case. The historical evidence cited by petitioner helps him establish a *prima facie* case of discrimination. However, he also must demonstrate that the race-neutral explanations offered by the prosecution were merely pretextual. This heavy burden is heightened by the onerous standard of review in federal habeas cases. Here, the trial court found that "the primary reasons for the exercise of the challenges against each of the veniremen in question, their reluctance to assess or reservations concerning the imposition of the death penalty, were closely and directly related to the facts of the case" and negated any inference of discrimination. (Supp. Tr. at 6-7). The record supports this determination. Consequently, the finding is not "unreasonable." See 28 U.S.C. § 2254(d); Drinkard, 97 F.3d at 769. This ground for relief is without merit and should be overruled.[19]

V.

CHALLENGE FOR CAUSE.

(Ground 5)

Next, petitioner contends that the trial court improperly excused a prospective juror for cause based on her reluctance to impose the death penalty.

A. Applicable Law

The Sixth Amendment to the United States Constitution guarantees a defendant the right to trial by an impartial jury. U.S. CONST. amd. VI. This prevents the imposition of punishment in a capital case by a jury organized to guarantee a death sentence. Witherspoon v. Illinois, 391 U.S. 510, 521-22, 88 S.Ct.1770,1776-77, 20 L.Ed.2d 776 (1968). Still, a

[19] The Court also notes that an African-American served on the jury. The Fifth Circuit has suggested that this may be sufficient to negate a claim of purposeful discrimination. *See United States v. Ratcliff*, 806 F.2d 1253, 1256 (5th Cir. 1986), *cert. denied* 107 S.Ct. 1625 (1987) (no hint of racial discrimination where two of the remaining twelve jurors were black).

potential juror may be excused for cause if his views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. "*Wainwright v. Witt*, 469 U.S. 412, 424,105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985), *quoting Adams v. Texas*, 448 U.S. 38, 45,100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980). Juror bias need not be proved by "unmistakable clarity." Witt, 105 S.CT. at 852. Rather, the trial judge has discretion to determine whether a prospective juror can faithfully and impartially apply the law. *Id.* at 852-53. This determination is entitled to a presumption of correctness and should be reversed only in a "clear case." *Id.* at 854 n.9, *quoting Reynolds v. United Stares*, 8 Otto 145, 98 U.S. 145, 156-57, 25 L. Ed. 244 (1879).

B. Discussion

All potential jurors were questioned about their feelings on capital punishment. One juror, Joyce Willard, explained her views on the subject as follows:

> Well, I feel that-of course, I know the bible says an eye for an eye and a tooth for a tooth, but to go further into detail, I feel like if you go and have premeditated thoughts about doing somebody bodily injury, then yes I do believe in the death penalty. If murder was not the utmost in your mind, them I'm not real sure what I—don't know if I can give you an answer on that or not. I have minced emotions about that.

(SF Voir Dire-VIII 3092). Willard later expressed reservations about imposing the death penalty for a murder that was not "premeditated." (*Id.* at 3095-96) The prosecutor told Willard that premeditation was not an element of capital murder. Rather, the state was only required to prove course of committing robbery. (*Id.* at 3098-99). . After the prosecutor explained the elements of the offense in more detail, Willard said:

> [I]f it is proven and you have proved that this gentlemen has done these two things, if he went in there and intentionally caused someone—in the process he killed someone and it was proven that this happened-I don't know if there were any witnesses or what, but—I would have to go along with the death penalty then.

(*Id.* at 3102). The prosecutor then asked Willard if she could serve on a death penalty jury. At first she replied:

> That is very difficult for me to decide. Like I say, a human life is on trial here. I know one has been taken and I don't believe in taking a human life, of course. I have always had kind of mixed emotions, but I felt like somebody who took someone's life should be assessed the death penalty. Like I say, I don't-I may be contradicting what I told you before. I don't know if I could really assess the death penalty to another human life. If it came down to the point where it was proven to me beyond a shadow of a doubt that he was guilty, then I'm sure I could.

(*Id.* at 3106-07). Willard became equivocal upon further questioning by the prosecutor. (*Id.* at 3110-113). When pressed for a definite answer as to her ability to serve on the jury, Willard responded "no." The prosecutor then asked:

> Are you telling me that you would not take the oath because you don't feel like you are suited or you can serve on this type of a jury? If you're telling me that, that's fine.

Willard answered, "I believe that's what I'm telling you." (*Id.* at 3117).

Defense counsel attempted to rehabilitate this juror. He asked whether she could follow her oath by rendering a verdict based on the law and the evidence. Willard responded:

> If I were on the jury and had to be a part of rendering the verdict, I guess it would be--it would be difficult to render a verdict even though, like I told you, I do believe in capital punishment. If that was what was necessary to do and I were on the jury, I probably could go along even though it would be with me for the rest of my life.

(*Id.* at 3122). Willard continued to speculate as to her ability to take the oath: At one point Willard told defense counsel that she "would have to take the oath before I could be on the jury,' but "I wouldn't want to." (*Id.* at 3124, 3127-28).

Eventually, the trial court intervened. The judge asked Willard if her personal feelings would interfere with her judgment about the law and the evidence in the case. Willard said, "Well, knowing me I would probably break down." (*Id.* at 3143). However, she reluctantly acknowledged her ability to answer the special issues based on the evidence. (*Id.* at 3148-49).

The judge then asked:

> Q: (THE COURT]: [C]an you take the oath to follow the law and then discharge your duties as a juror or can you not take an oath and do that, that is discharge your duties as a juror, whatever they may call you to do? Can you give me a yes or no and there won't be any more questions?
>
> A: MLLARDI: I guess I better answer you no.
>
> Q: Ms. Willard, no, you could not take the oath, right?
>
> A: I don't guess I could after all these things have been put to me. I thought maybe I could, but after the way things have been presented to me and the way I'm understanding things, if I'm understanding correctly, then I don't believe I could.

> Q: One foal quibble with you. You used the words I think and unfortunately--you said no and then you said I think. Is it no, I cannot do it or yes, I can do it or—
>
> A: Okay. We'll put no I cannot do it.

(*Id.* at 3150-51).

The trial court excused Willard for cause. Petitioner now contends that Willard only began expressing doubts about her ability to sit on the jury after the prosecution presented a distorted and manipulative view of Texas law. He accuses the prosecutor of attempting to sow artificial doubt in the mind of this juror by "hammer(ing] home the grisly realities of the death sentence, while offering (her] an "escape hatch' to avoid jury service by implying that she need not serve if doing so would trouble her conscience." (Am. Petition at 293). The Court has carefully reviewed the voir dire examination and finds no evidence of impropriety. Evidently, neither did defense counsel since he never objected to any of the prosecutor's questions. The lengthy colloquies involving Willard's ability to take the oath and serve on the jury were the result of her own indecision and equivocation-–not any improper questioning by the prosecutors.

Petitioner further argues that there was no legal basis to strike Willard for cause. He points out that Willard believed in capital punishment. She merely "expressed hesitation and emotional turmoil at the prospect of rendering a verdict that would result in another person being killed." (Am. Petition at 303). If this were the extent of her testimony, Willard might not be disqualified. *See, e.g. Alderman v. Austin*, 663 F.2d 558, 563 (5th Cir.1981), *aff'd on reh'g*, 695 F.2d 124 (5th Cir.1983) (jurors who favored capital punishment and could vote to inflict the death penalty were not disqualified because of inability to sign verdict form). However, Willard also stated that she could not take the oath and discharge her duties as a juror. At best, her testimony was ambiguous and

contradictory. (SF Voir Dire-VIII 3146, 3148-49, 3115, 3121). The trial court struggled with this issue and concluded that "(Willard's] view about participating in the death penalty process would prevent or substantially impair her performance of her duties as a juror in this case." (*Id.* at 3155). As the Supreme Court has noted:

> What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear;" these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, of may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . *[T]his. is why deference must be paid to the trial judge who sees and hears the jurors.*

Witt, 105 S.Ct. at 852 (emphasis added). Such is the case here. The trial judge had an opportunity to observe Willard's demeanor and assess her credibility. He ultimately concluded that she could not take the oath and accept the duties of her office. Petitioner has failed to establish that this determination was "unreasonable . . . . in light of the evidence presented in the state court." 28 U.S.C. § 2254(4). This ground for relief should be overruled.[20]

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[20]Although not mentioned in his brief, petitioner has provided the Court with a copy of the Findings and Recommendation of Magistrate Judge Charles Bled in *Troy Dale Farris v. Gary Johnson*, No. 4-94-CV-0142-Y (N.D. Tex. January 21, 1997) (Am. Petition, Exh. 35). The issue presented in Farris is similar to the one raised by petitioner in the instant case-whether a prospective juror was improperly excused for cause based on her opposition to the death penalty. Judge Bleil noted that the juror consistently maintained she could answer the special issues on punishment and follow the law given by the court. Consequently, there was no legal basis to challenge the juror for cause. *Farris*, No. 4-94-CV-0142-Y, op. at 55-56.

Unlike the juror in *Farris*, Joyce Willard said that she could not take the oath or discharge her duties as a juror. This fact alone distinguishes the two cases. More importantly, Judge Bleil's recommendation was rejected by the district judge. *Farris v. Johnson*, 967 F.Supp. 204, 206 (N.D. Tex. 1997), aff'd, 144 F.3d 50 (5th Cir.) (Table), *cert. denied*, 119 S.Ct. 516 (1998). Therefore, Farris does not dictate a contrary result.

VI.

COMPETENCY
(Grounds 3 & 4)

Petitioner raises two arguments regarding his mental competency. First, he contends that the trial court should have conducted a competency hearing. Second, he claims that he was not competent to stand trial.

A. Applicable Law

Due process prohibits the trial of a defendant who is mentally incompetent. *Godinez v. Moran*, 509 U.S. 389, 396,113 S.Ct. 2680, 2685, 125 L.Ed.2d 321(1993); Pate v. Robinson, 383 U.S. 375, 378, 86 S.Ct. 836, 838,15 L.Ed.2d 815 (1966). This means that a defendant must have the "capacity to understand the nature and object of the proceedings against to consult with counsel, and to assist in preparing his defense . . ." *Drope v. Missouri*, 420 U.S.162,171, 95 S.Ct. 896, 903, 43 L.Ed.2d 103 (1975). See also *Dusky v. United States*, 362.U. S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960). The burden of establishing mental incompetency is extremely heavy. In order to obtain habeas relief, a petitioner must show that the facts are 'sufficient to positively, unequivocally and clearly generate a real, substantial and legitimate doubt' as to his mental competency at the time of trial." *Dunn v. Johnson*, 162 F.3d 302, 306 (5th Cir. 1998), *cent. denied*, 119 S.Ct. 1507 (1999), quoting *Washington v. Johnson*, 90 F.3d 945, 950 (5th Cir. 1996), cent. denied, 117 S.O. 1259 (1997).

State courts must employ procedures designed to protect against the trial of incompetent defendants. *Drope*, 95 S.Ct. at 904-05; Pate, 86 S.Ct. at 842-43. A competency hearing is required "if the evidence raises a bona fide doubt as to the defendant's competency at that time." *Lokos v. Capps*, 625 F.2d 1258, 1261 (5th Cir. 1980). The trial court should consider: (1) any history of irrational behavior; (2) the bearing and demeanor of the defendant in court; and (3) prior medical opinions. See Dunn,162 F.3d at 305; *Reese v. Wainwright*, 600 F.2d 1085, 1091 (5th Cir.), *cent. denied*, 100 S.Ct. 487 (1979).

B. Medical Evidence

Petitioner was shot by Houston police officers at the time of his arrest on November 21, 1985.[21] He sustained serious abdominal injuries and was taken to Ben Taub Hospital for treatment. Surgeons removed part of his intestines, repaired damage to his internal organs, and performed a double-barreled colostomy. Petitioner remained hospitalized for eight weeks. During this time, he experienced complications and underwent an exploratory laparotomy to remove adhesions. Petitioner lost a total of 57 pounds during his hospital stay. He was eventually discharged to the custody of Harris County officials on January 12, 1986. (Am. Petition, Exh. 18).

Four days later, petitioner arrived at the Dallas County Jail. He complained of pain at his colostomy site and swollen extremities. Petitioner was treated with a variety of medications and placed on a double portion diet to regain weight. Jail records show that petitioner began expericening chest pain on January 21, 1986. The next day, his symptoms

[21] Petitioner fled to Houston after he killed a motel clerk in Irving, Texas. He was apprehended five days later by Houston police officers. The shooting occurred when petitioner approached one of the officers with a KG99 machine gun as he was attempting to evade arrest. (SF Trial-II 687, 698-704).

included "chills and fever." Petitioner was given Motrin and Septra, an antibacterial medication. A wheelchair was ordered so he could go to court. However, petitioner no longer needed a wheelchair by the time jury selection began on February 3, 1986. (*Id.*, Exh. 21 & 22).

At the end of the first week of jury selection, petitioner still had chest pain, chills, and fever. This prompted the trial judge to order a medical evaluation. (*Id.*, Exh. 21). Petitioner was taken to Parkland Hospital on February 10, 1986, where he was diagnosed with pneumonia. He was discharged the same day with a prescription for Darvocet and Erythromycin. (*Id.*, Exh. 24). Jury selection resumed the next morning.

Petitioner continued to complain of chest pain throughout the month of February. He also reported delays in the receipt of his medication.[22] On February 19, 1986, the trial judge the jail doctor to determine whether petitioner needed more pain medication for his "well-being." (*Id.*, Exh. 27). Dr. Adrian Collyns responded to this inquiry on February 24, 1986. He advised the judge:

> I have seen this man professionally on a number of occasions recently. A chest Xray on Feb. 21, 1986 was done. In my opinion he does not now require prescription pain killers.

(Am. Petition at 231).

The next day, defense counsel protested that petitioner had not been getting his medication on a regular basis. Petitioner then told the judge that he had not seen a doctor since his last

[22] Petitioner alleges that the jail medical staff "continually failed to [administer] his antibiotics and pain medication on schedule." (Am. Petition at 22.7). Tae Court acknowledges that the medical records are less than clear on this point. However, this ambiguity does not necessarily establish that the medications were not given as directed.

visit to Parkland Hospital on February 10, 1986.[23] The judge replied:

> [THE COURT]: Mr. Cunningham and Mr. West, the only thing I can say—first of all, I received a letter from a Dr. Adrienne [sic] H. Collyns, which I'll make part of the Court's file, and it says in so many words, as of February 24th, he does not have the opinion that the Defendant needs pain killer prescriptions. Now, whether he needs other medicines, I don't know. I'm not obviously a doctor. I'm going to be guided by what the jail doctors say. If you-all have any suggestions, I'll be glad to help you in any way I can.
>
> [DEFENSE COUNSEL]: If he says as of February 24th, that would be yesterday and I don't know if the doctor. would say that if he hasn't seen him.
>
> [THE COURT]: I got this letter delivered to me late yesterday afternoon after we recessed.
>
> [DEFENSE COUNSEL]: I would ask the Court to at least have whoever that doctor is examine Mr. Miller-Eland I would also like to talk with him to see whether or not-what he is using to base that on for Mr. Miller-El's benefit because he tells Mr. West and he tells myself that he's hurting and he needs some medicine. We don't want him to think that we're not advising the Court.
>
> [THE COURT]: I'm advised and I'm pretty well guided by what the doctor says. Let me suggest that you and Mr. West talk to Dr. Collyns or the jail nurse up there and see what their answers are to your questions. If there is a dispute, I'll be glad—

[23]Petitioner acknowledged that he had seen a nurse as recently as February 20, 1986, but "they say that they can't do nothing." (SF Voir Dire-VII 2782).

> [DEFENSE COUNSEL]: Mr. West will track it down, Judge, and we'll go on with Ms. Williams.

(SF Voir Dire-VII 2782-84).

Petitioner was examined again by Dr. Collyns on February 26, 1986. He complained of constant chest pain that worsened at night. The doctor noted some tenderness and mild swelling over the right inferior scapula area. His lungs were clear with good breath sounds. Based on the results of this examination, Dr. Collyns concluded that petitioner was "fit to attend court." (Am. Petitioner, Exh. 21).

These symptoms persisted for several more days. During this time, petitioner continued to receive antibiotics and non-prescription medications. Then on March 4, 1986—just two days before jury selection coucluded--petitioner was taken to Parkland Hospital for treatment of a chest abscess. He developed an infection and returned to the hospital six days later. A follow-up visit was scheduled for March 12, 1986. However, wound care was provided by the jail medical staff instead. (*Id.*, Exh. 21 & 22).

The next entry in petitioner's medical chart is dated March 20, 1986—one week after the trial began. Petitioner complained of soreness around his rib cage and asked to see a doctor. The next day, the following exchange occurred in open court:

> [PROSECUTOR]: Mr. Hall, you have previously identified the man sitting at the end of the table-
>
> [DEFENSE COUNSEL]: Your Honor, we'll object. He's not sleeping.
>
> [PROSECUTOR]: well, be was when I was—
>
> [DEFENSE COUNSEL] : Your Honor, I would object to the side-bar remark.

> [THE COURT]: Sustained. Disregard that, ladies and gentlemen.

(SF Trial-III 1151) (emphasis added).[24] The trial court then recessed the proceedings until March 24, 1986.

Shortly after the trial resumed, the state concluded its case-in-chief. The defense rested without presenting any evidence and both sides closed. At that point, the trial judge advised

petitioner of his right to testify and the consequences of doing so. Petitioner said that he understood his rights but did not want to testify. The court then stated:

> [THE COURT]: I]t might be a bit late to ask this question, but I've seen no evidence that the Defendant is not competent to either stand trial or make these—decisions on his own behalf
>
> [DEFENSE COUNSEL]: Your Honor, to the best of my knowledge, Mr. Miner-El is competent and is aware of the facts and knows what is going on. Is that true, Mr. Miller-El?
>
> [DEFENDANT]: Yes.
>
> [THE COURT]: Well, I'll note for the record that throughout the trial including voir dire that this Defendant appeared, from the bench, to participate actively with his lawyers in jury selection decisions and also during the trial as regards cross-examination of witnesses and such as that. Having heard nothing else, I'm going to find that he makes his decision competently and I, of course, will honor it.

(*Id.* at 1197-98) (emphasis added).

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[24] It is not clear whether the prosecutor actually referred to petitioner as 'the than steeping at the end of the table' or whether defense counsel misunderstood the question, However, the record reflects that petitioner was seated at the end of the table next to his attorneys. (SF Trial-I 419).

The guilt-innocence phase of the trial ended that day with a finding of guilt. Later that evening, petitioner complained of nausea and a problem with his colostomy bag. (Am. Petition, Exh. 21). The trial judge ordered a medical evaluation to determine whether petitioner was "able to sit thru court." (*Id.*, Exh. 29). Petitioner was taken to Parkland Hospital and kept overnight for treatment of a small bowel obstruction. (*Id.*, Exh. 24).

The punishment phase of the trial commenced on March 25, 1986—the same day petitioner was released from the hospital. The following afternoon, the jury sentenced him to death. Petitioner continued to have problems with his colostomy bag and recurrent infections over the next eight months. His condition finally improved after surgeons closed his colostomies in November 1986. '(*Id.*, Exh. 21, 24, 30-32).

C. State Habeas Proceeding

Petitioner did not challenge his mental competency on direct appeal. Instead, he first raised the issue in an application for writ of habeas corpus.'[25] Petitioner alleged, *inter alia*, that he was not competent to stand trial due to his debilitating physical injuries, complications arising from his surgeries, and the side effects of pain medication. The state answered these allegations in a written response. Both parties submitted supplemental briefs and expert affidavits in support of their respective positions.

The state relied on the Affidavit of Steven P. Bowers, Medical Director for the Dallas County Jail System. Dr. Bowers reviewed selected portions of petitioner's medical records and a chronology of events prepared by the state. He noted that petitioner was on a number of medications during

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[25] Petitioner filed his application for post-conviction relief on May 16, 1995—nearly *nine years* after his trial concluded and just hours before his scheduled execution.

his trial. However, the only medication that might have affected him to any degree was Darvocet. Dr. Bowers explained that Darvocet is 'relatively low in strength compared to other prescription pain medications." According to the medical records, petitioner received two Darvocet tablets three tunes a day. This is less than the maximum allowable dosage. Dr. Bowers found no indication that petitioner was impaired by any of his medications. He did not exhibit a pattern of recurrent drowsiness, stupor, being difficult to arouse, or any bizarre behavior. Although petitioner was transported to the hospital several times during his trial, Dr. Bowers noted that each treatment was less than 24 hours in duration. This indicated that most of his medical problems were not serious. Based on this evidence, Dr. Bowers concluded that petitioner was competent to stand trial and assist in his defense. (Am. Petition, Exh. 25).

Petitioner countered with the Affidavit of Ari Kiev, a board-certified psychiatrist. Dr. Kiev reviewed all of petitioner's medical records and evidence submitted by both parties in the state habeas proceeding. This evidence showed that petitioner was in a weakened condition at the time of his discharge from Ben Taub Hospital on January 12, 1986. Petitioner was anemic, had a substantially reduced blood volume, and lost a considerable amount of weight. He also experienced complications with his colostomies, suffered from pneumonia, developed recurrent infections, and frequently complained of pain throughout the trial. Dr. Kiev noted that petitioner was medicated with Darvocet, which "can sometimes produce sedation and dizziness as side effects.' He believed that petitioner may have experienced some of these symptoms while taking the medication. Dr. Kiev stated that the combination of these factors, together with an inadequate diet and sleep deprivation, "contributed to an inability of [petitioner] to participate fully and to the best of his normal abilities in the preparation and presentation of

his own defense . . ." He then offered this rather bold assessment of petitioner's mental state:

> [Petitioner], because of the depressive effects of a prosthesis such as a colostomy, which reduces the recipient's ability to deal with stress, his physical debilitation and a depressive reaction secondary to his injury and circumstances, which produces apathy and lethargy, had given up and resigned himself to his fate, and was not showing any of the self protectiveness and survival instincts which would otherwise be normal under the circumstances.

Dr. Kiev surmised that petitioner "would have exhibited such a level of passivity and willingness to go along with whatever was offered that it amounted to an expression of suicidal intent to end his life." In his opinion, petitioner should have been evaluated to determine his mental competency. (*Id.*, Exh. 19).

The trial court resolved this conflicting evidence in favor of the state. Specifically, the court found that: (1) petitioner was legally competent both on and off his pain medication; (2) he had the capacity to understand the nature and object of the proceedings against him, consult with his attorneys, and assist in the preparation of his defense; and (3) a competency hearing was not required because "there was no "bona fide doubt' as to [petitioner's] competence to stand trial." (*Id.*, Exh. 34 at ¶¶ 17-21). The judge based his findings on the exhibits submitted by both parties, the chronology of events prepared by the state, and his own recollection. After conducting an independent review of the record, the Texas Court of Criminal Appeals reached the same conclusion and denied habeas relief. *Ex parte Miller-El*, No. 31,001-01.

D. Discussion

Petitioner argues that the state habeas proceeding was flawed in four respects: (1) the chronology of events prepared by the state omitted significant information and misrepresented critical facts about his medical condition; (2) the Affidavit of Dr. Steven Bowers was incomplete and unreliable; (3) the trial court ignored his evidence; and (4) the state improperly submitted its proposed findings of fact and conclusions of law to the trial court ex parse. As a result of these defects, petitioner contends that he was denied a full and fair opportunity to litigate his competency claim in state court. He therefore seeks a de novo review in federal court.

A federal habeas petitioner is entitled to a de novo review of a state court's competency determination only "when he makes a showing by clear and convincing evidence to raise threshold doubt about his competency." *Carter v. Johnson*, 131 F.3d 452, 460 (5th Cir. 1997), cent. denied, 118 S.Ct. 1567 (1998), quoting hokos, 625 F.2d at 1261. In order to raise such a doubt, a petitioner must present facts sufficient "to positively, unequivocally and clearly generate a real, substantial and legitimate doubt" concerning his mental capacity. Carter, 131 F.3d at 460 (citations omitted); *see also United States v. Willians*, 819 F.2d 605, 609 (5th Cir. 1987), *cent. denied*, 108 S.Ct. 726 (1988). Petitioner has failed to meet this heavy burden. Nothing in the trial record suggests that he lacked the capacity to understand the proceedings, consult with his lawyers, or assist in the preparation of his defense. To the contrary, defense counsel told the trial judge that petitioner was. competent to stand trial and make decisions on his own behalf.[26] Petitioner agreed with that

[26] E. Brice Curmingham, lead trial counsel for petitioner, told the state habeas court that he was unaware of the "full gravity" of his client's medical condition. Cunningham testified:

> After learning more about (petitioner's medical condition] at the time of his trial, Trial Counsel would have brought the matter of Mr. Miller-El's medical condition to the court's attention, requested a Hearing to determine this fact, and would have done whatever was possible to assure Mr. Miller-El's receiving the best possible medical attention, either in the Dallas County Jail, Parkland Memorial Hospital, or some other medical facility chat could have dealt with his problem.

(Am. Petition, Exh. 28 at 6). Significantly, Cunningham never stated that these medical problems prevented petitioner from cooperating with his lawyers or assisting in the presentation of his defense.

assessment. (SF Trial-III 1198). This fact, standing alone, is persuasive evidence that no Pate violation occurred. *See, e.g. Moody v. Johnson*, 139 F. 3d 477, 482 (5th Cir.), *cert. denied*, 119 S.Ct. 359 (1998); *Reese*, 600 F.2d at 1092.

Moreover, the trial judge had an opportunity to observe petitioner's demeanor and behavior on a daily basis over an eight-week period. The judge ordered at least two medical evaluations to determine whether petitioner was "able to sit thru court." (Am. Petition, Exh. 27 & 29). None of the doctors who examined petitioner raised any concerns about his mental competency. In addition, petitioner was questioned by his attorneys and the trial judge at various points throughout the proceeding. He answered all questions in a direct and coherent manner.[27] This evidence further undermines petitioner's competency claim.

Petitioner points out that his expert, Dr. An Kiev, thoroughly reviewed all the medical evidence and concluded that he was mentally incompetent to stand trial. The Court acknowledges that the affidavit prepared by Dr. Kiev is more detailed than the affidavit submitted by Dr. Bowers. However, this does not require the trial court to credit his testimony. Although Dr. Kiev opined that petitioner was unable to "participate fully and to the best of his normal abilities in the preparation and presentation of his own

[27] Petitioner attempts to minimize the significance of his answers by characterizing there as single-word responses. (Am. Petition 238 a.43). However, the record shows that petitioner answered several questions with complete sentences. (SF Voir Dire-III 2779-84; Punishment-11 17-19).

defense," the trial judge was entitled to rely on his own observations and the testimony of Dr. Bowers in reaching a different conclusion. *See Carter*, 131 F.3d at 461. Moreover, the Fifth Circuit has twice found similar expert psychiatric testimony insufficient to prove a "real, substantial and legitimate doubt concerning mental competency so as to overcome the presumption of correctness attached to state court findings. *See id.*; Williams, 819 F.2d at 608-09. The fact that the trial court did not mention Dr. Kiev's affidavit in its findings does not overcome this presumption. *See Carter*, 131 F.3d at 461.

Nor is the anecdotal evidence cited by petitioner sufficient to rebut the state court funding. Petitioner refers to his repeated requests for pain medication and a comment made by the prosecutor that he was sleeping in court. There is no doubt that petitioner experienced some pain as a result of his physical injuries, pneumonia, and recurrent wound infection. However, there is no objective medical evidence that this pain or the side effects of his medication prevented petitioner from assisting in the preparation and presentation of his defense. Similarly, the prosecutor's ambiguous remark hardly constitutes clear and convincing evidence of mental in competency. A careful reading of the record discloses that the prosecutor never accused petitioner of sleeping in court. Rather, he asked if a witness could identify petitioner as "the man *sitting* at the end of the table." Defense counsel apparently misunderstood the question and pointed out that petitioner was "*not sleeping*." (SF Trial-III 1151) (emphasis added).

Petitioner has failed to show that there are sufficient facts to "positively, unequivocally and clearly generate a real, substantial and legitimate doubt" as to his mental competency at the time of trial. Moody, 139 F. 3d at 481; Carver, 131 F.3d at 464. Therefore, any defects in* the state habeas proceeding

were immaterial. This ground for relief is without merit and should be overruled.

VII.

RELIGIOUS AFFILIATION
(Ground Na. 6)

Finally, petitioner contends that the prosecutor improperly referred to his religious affiliation and disparaged his beliefs during the punishment phase of the trial.

A. Applicable Law

The First Amendment protects the right of an individual to join groups and associate with others holding similar beliefs. *Citizens Against Rent Control Coalition for Fair Housing v. City of Berkley*, 454 U.S. 290, 294, 102 S.Ct. 434, 436, 70 L.Ed.2d 492 (1981). This precludes the state from introducing evidence of a defendant's "abstract beliefs" during the punishment phase of a criminal trial. *Dawson v. Delaware*, 503 U.S.159, 168, 112 S.Ct.1093, 1099, 117 L.Ed.2d 309 (1992). However, such evidence is admissible if it is sufficiently related to issues involved in the case. *Id.*, 112 S.Ct. at 1099; *Fuller v. Johnson*, 114 F.3d 491, 498 (5th Cir.), *cert. denied*, 118 S.Ct. 399 (1997); *Boyle v. Johnson*, 93 F.3d 130, 183 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 968 (1997).

B. Discussion.

Petitioner belongs to a Muslim sect known as the Moorish Science Temple. Members of this religious group typically wear turbans and other distinctive articles of clothing. Approximately two weeks before the murder, petitioner attended a Moorish Feast at the Holiday Inn South in Irving, Texas. Two hotel employees identified petitioner as one of the participants at this function. Donald Ray Hall, the chief night auditor, testified that petitioner "was dressed in like a Moslim [sic] outfit and he had on a turban." (SF Trial-I 420).

Philip Bond, the hotel manager, testified that several attendees "had turbans on their heads." (*Id.* at 27). Petitioner did not object to this testimony, and tacitly concedes that this evidence was admissible at the guilt innocence phase of the trial to prove his identity.[28]

However, petitioner maintains that the prosecutor crossed the line when he questioned Stanley January during the punishment hearing. January testified that he met petitioner as part of a scheme involving illegal drugs. After January described his involvement in this scheme, the prosecutor inquired:

> Q: [BY PROSECUTOR]: Let me ask you: Did Thomas join some sort of political organization?
> A: [BY WITNESS]: Muslims, which is the Moorish Science Temple.
> Q: Temple of America?
> A. Yes.
> Q: They are Muslims?
> A: Yes.
> Q: Did they attempt to get you to join their group?
> A: Well, me and Thomas Miller-El had a fall-out because he said that I wasn't into, you know, the Moorish Science Temple of America, and so by me not being into that, he just trusted me a little bit.

(SF Punishment-II 54-55). The prosecutor made two other references to petitioner's "so-called religious organization while examining January. (*Id.* at 69, 80). He returned to this issue during closing argument:

[28] The trial court found that petitioner's affiliation with the Moorish Science Temple was relevant "to proving [his] identity as the person who committed the robbery/murder and to demonstrate the reliability of eyewitness Donald Hall's identification . . . "(Am. Petition, Exh. 34 at ¶ 111).

> There's not a whole lot you can do for Don Hall, but there is about a million and a half other people that still live here and don't want this community turned into a war zone, where people like Miller-El can indulge in conduct that amounts to paramilitary activities, crime, whatever you want to call it: criminal behavior, whatever; whether it's political, philosophical, religious or whatever, if it's motivated by the facts in this case that show you it's uncontrollable and insatiable greed, nonetheless, it leaves in its wake what it left here.

(SF Punishment Arg. 5) (emphasis added).

The state court found that the prosecutor did not criticize or degrade petitioner's religious philosophy, beliefs, or practices. Moreover, the court found that the admission of this evidence did not inflame or prejudice the jury against petitioner on religious grounds. (Am. Petition, Exh. 34 at 185). Petitioner has failed to rebut these findings by clear and convincing evidence. The passing references to his "so-called religion" and possible religious motivation for the crime are equivocal at best.[29] In addition, the jury was already aware of petitioner's religious affiliation because it was properly introduced into evidence during the guilt-innocence phase of the trial. Petitioner has failed to establish an error of constitutional magnitude that justifies federal habeas relief.

[29] Indeed, petitioner acknowledges that "it is impossible to determine what role the Moorish Science Temple evidence played in his death sentence." (Am. Petition at 336).

RECOMMENDATION

Petitioner's application for writ of habeas corpus should be denied.

DATED: January 31, 2000.

/s/ Jeff Kaplan
JEFF KAPLAN
UNITED STATES MAGISTRATE JUDGE

IN THE
UNITED STATES DISTRICT COURT
for the NORTHERN DISTRICT of TEXAS,
DALLAS DIVISION

Civil No. 3:96-CV-1992-H

THOMAS JOE MILLER-EL
Petitioner,

v.

GARY JOHNSON, Director, Texas Department of Criminal Justice Institutional Division
Respondent.

MEMORANDUM OPINION AND ORDER

This is a death penalty case.

Before the Court are the Findings and Recommendation of the United States Magistrate Judge, signed January 31, 2000; and Petitioner's Objections, filed February 25, 2000. Magistrate Judge Kaplan recommended that Miller-El's habeas corpus petition be denied. Pursuant to Fed. R. Civ. P. 72(b), this Court has made a de novo review of the portions of the Magistrate Judge's disposition objected to by Petitioner. Additionally, the Court heard oral argument from Petitioner and Respondent on April 25, 2000.

Based on the pleadings, evidence, and arguments of counsel, the Court hereby ADOPTS the findings and recommendation of the Magistrate Judge, except as MODIFIED below. MillerEl's petition for a writ of habeas corpus is DENIED.

I. ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT ("AEDPA") STANDARD

At the outset, the Court recognizes the recent changes in habeas jurisprudence. Pursuant to the AEDPA, a federal court may not grant habeas relief on any claim that was adjudicated on the merits in a state court proceeding unless the petitioner shows that the prior adjudication: (1) resulted in a decision that was "contrary to, or involved an unreasonable application of, clearly established federal law," or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Until very recently, the Fifth Circuit had held that an application of law to facts is not "unreasonable" unless "[the] state court decision is so clearly incorrect that it would not be debatable among reasonable jurists." Drinkard v. Johnson, 97 F.3 d 751, 769 (5th Cir.1996).

The Supreme Court recently suggested that this standard is erroneous. *See Williams v. Taylor*, _U.S._, 120 S.Ct.1495 (2000). In Williams, decided April 18, 2000, the Court criticized the

Fifth Circuit's standard:

> The 'all reasonable jurists standard' would tend to mislead federal habeas courts by focusing their attention on a subjective inquiry rather than on an objective one. For example, the Fifth Circuit appears to have applied its 'reasonable jurist' standard in just such a subjective manner. *See Drinkard v. Johnson*, 97 F.3d 751, 769 (1996).
> . . .

Williams, 120 S.Ct. at 1521-22. It appears that the *Drinkard* opinion has been overturned to the. extent it required a subjective inquiry into what is an "unreasonable application" of facts to the law. The Supreme Court went on to ostensibly clarify that, under AEDPA, a state court decision may be 1~ or erronem application of the law to the facts, but may not be an unrcas application. *See Williams*, 12 S.Ct. at 1522.

The Magistrate Judge made his recommendation before *Williams v. Taylor* was decided, and cited the *Drinkard* "reasonable jurists" standard of review. Therefore, the Court modifies the portions of the Magistrate Judge's recommendation that rely on *Drinkard*. (Magistrate's Findings at 3, 23). However, upon review of the pleadings, the Court finds that the change in the standard review has no determinative effect on the findings of the Magistrate Judge.

II. BATSON[20] AND SWAIN[21] CLAIMS

A. Swain claim

The Court agrees with the Magistrate Judge that *Swain* does not provide an independent basis for challenging the prosecutor's use of peremptory challenges, and that Petitioner's claim must be analyzed under *Batson*. In each of the cases cited by Petitioner that allow relief under Swain (Petition at 179,184; Objections at 9 n. 4), Batson was found inapplicable because it was decided after the defendant's conviction and appeal. Miller-El cites no case that grants *Swain* relief in which *Batson* was also applied to the prosecutor's use of peremptory challenges. Therefore, the Magistrate Judge's recommendation on the Swain claim is accepted in whole.

B. Batson claim

The principal legal objection to the Magistrate Judge's recommendation on the Batson claim is that the Magistrate should have placed more weight on the strong evidence of discrimination injury selection by Dallas County District Attorneys at the time of Petitioner's trial. Petitioner cites the plurality in *Hernandez v. New York*, 500 U.S. 352 (1991) for the proposition that the trial judge must take all evidence into

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[20] *Basson v. Kentucky*, 476 U.S. 79 (1986).

[21] *Swain v. Alabama*, 380 U.S. 202 (1965).

account in the third step of the Batson inquiry—whether the Defendant has proved purposeful discrimination. However, *Hernandez* also stands for the deference of a federal habeas court to the credibility determination of the state trial judge in determining discriminatory intent. *See Hernandez v. New York*, 5 00 U. S. 3 52, 3 6 5 (1991). The Magistrate judge properly deferred to the experience of the trial court judge in evaluating the demeanor of each juror and the prosecutor in determining purposeful discrimination.

Petitioner's objections to the Magistrate's factual findings are overruled. The Magistrate Judge did not "discount the massive evidence" in support of the first step of the Batson inquiry--the prima facie case that the prosecutor excluded jurors solely on the basis of their race. Rather, the Magistrate noted that an inference of purposeful discrimination had already been found by the Court of Criminal Appeals, and determined that further discussion of the evidence in support of the prima facie case was unnecessary.

III. COMPETENCY CLAIMS

Miller-El's first objection is that the Magistrate Judge failed to conduct a de nova review of his *Pate*[22] and *Dusky*[23] claims. Miller-El cites no authority for the proposition that a state trial court's adoption of one party's proposed factual findings and legal conclusions corrupts the judicial process so that his claim is not "adjudicated on the merits" under 28 U.S.C. § 2254(4). Equally, there is no authority that the Fifth Circuit has adopted the pre-AEDPA Townsends[24] exceptions

[22] Pate v. Robinson, 393 U.S. 375 (1966).

[4]Dusky v. United States, 362 U.S. 402 (1960).

[24] Townsend v. Sain, 372 U.S. 293 (1963).

to the presumption of correctness in 28 U.S.C. § 2254(4) and 28 U.S.C. § 2254(e)(1).

Miller-El's second objection is that the Magistrate Judge did not expressly address his *Pate* claim. This Court holds that the Magistrate's factual findings show that the Pate claim is not meritorious. Objectively considered, the information received by the trial court regarding Mller-El.

El's condition would not have alerted him to the possibility that Petitioner could not rationally aid his attorney in his defense. Both the Petitioner and his attorney, as well as the trial judge, state on the record that Miller-El was competent and aware of the proceedings.The Court finds that Petitioner has not established a *Pate* claim.

Finally, the Court overrules Petitioner's objections to the Magistrate Judge's factual findings, as they are supported by the record in this case.

IV. CHALLENGE FOR CAUSE

The Magistrate Judge held that juror Joyce Willard was not improperly excluded from the jury panel in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968). Petition's objections point to no demonstrable error of law or fact. Therefore, the Court adopts the Magistrate Judge's findings and recommendation as to Petitioner's fifth ground for relief.

V. IMPROPER MENTION OF RELIGIOUS AFFILIATION

Petitioner claims that references to his membership in the Moorish Science Temple a the guilt-innocence and sentencing phase of this trial were in violation of *Dawson v. Delaware*, 503 U.S.159,165 (1992). While there is no "per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment," the government may only use such evidence when it is

sufficiently related to the issues involved. *Dawson v. Delaware*, 503 U.S. 159,165 (1992).

Petitioner objects that the Magistrate Judge did not explain the significance of the few references to Petitioner's religious affiliation at the punishment stage. The Court finds that, as evidence had been submitted at trial that other members of the Moorish Science Temple were armed and involved in crime, the references to Miller-El's membership in this group were related to the issue of future dangerousness. See, e.g., Fuller v. Johnson, 114. F.3 d 491, 498 (5th Cir. 1997), *cert denied*, 522 U.S. 963 (199?).

VI. CONCLUSION

Subject to the modifications above, the Court ADOPTS the Magistrate Judge's Findings and Recommendations. Mller-El's Petition for Writ of Habeas Corpus is hereby DENIED.

SO ORDERED

DATED: June_:5_., 2000

/s/ BAREFOOT SANDERS
BAREFOOT SANDERS
Senior U.S. District Court Judge
Northern District of Texas

United States Court of Appeals,
Fifth Circuit.

No. 00-10784

THOMAS JOE MILLER-EL,
Petitioner-Appellant,

v.

GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent-Appellee.

Following affirmance of state court conviction for capital murder, petitioner sought federal habeas relief. The United States District Court for the Northern District of Texas, Barefoot Sanders, J., 2000 WL 724534, denied petition, and denied petitioner's request for Certificate of Appealability (COA). Petitioner sought COA from Court of Appeals. The Court, DeMoss, Circuit Judge, held that: (1) state trial court's finding that prosecution's peremptory challenges of African-American jurors were race-neutral was entitled to great deference; (2) trial court's findings of competence to stand trial and non- entitlement to competency hearing were reasonable; (3) fact that state court post-conviction had provided paper competency hearing rather than live hearing did not justify federal-court nunc pro tunc hearing; and (4) admission of associational evidence at sentencing did not violate defendant's First Amendment rights.

Certificate of Appealability denied.

West Headnotes

[1]1 Habeas Corpus 818
197k818 Most Cited Cases

Substantial showing of denial of constitutional right required to warrant certificate of appealability (COA) requires that habeas petitioner demonstrate that his petition involves issues which are debatable among jurists of reason, that another court could resolve issues differently, or that issues are adequate to deserve encouragement to proceed further. 28 U.S.C.A. 2253(c)(2).

[2] Habeas Corpus 768
197k768 Most Cited Cases

Presumption required by federal habeas corpus statute that state court's determination of factual issue is correct is especially strong when state habeas court and trial court are one and the same. 28 U.S.C.A. 2250(1).

[3] Habeas Corpus 818
197k818 Most Cited Cases

While nature of penalty in capital case is an appropriate consideration for determining whether to issue certificate of appealability (COA), severity of penalty at issue does not by itself require issuance of COA. 28 U.S.C.A. § 2253(c)(2).

[4] Habeas Corpus
818 197k818 Most Cited Cases

In capital cases, doubts as to whether certificate of appealability (COA) should issue must be resolved in favor of petitioner. 28 U.S.C.A. § 2253(c)(2).

[5] Habeas Corpus 770
197k770 Most Cited Cases

State trial court's finding that prosecution in capital murder case had struck African-American jurors on race-neutral grounds, namely jurors' reluctance to assess death penalty, and had thus rebutted defendant's Batson challenge, was entitled to great deference in federal habeas proceeding. 28 U.S.C.A. § 2254(4)(2), (e)(1).

[6] Criminal Law 625.10(4)
110k625.10(4) Most Cited Cases

Trial court must conduct inquiry into defendant's mental capacity sua sponte if evidence raises bona fide doubt as to competency.

[7] Habeas Corpus 477
197k477 Most Cited Cases

Habeas petitioner may collaterally attack his state conviction by directly alleging incompetence at time of trial, thereby claiming violation of substantive right not to be tried and convicted while incompetent, as opposed to violation of procedural guarantee of competency hearing in event that bona fide doubt arises at trial as to competency.

[8] Habeas Corpus 477
197k477 Most Cited Cases

State trial court acted reasonably in finding that, first, capital murder defendant was not rendered incompetent to stand trial by physical complications and brief hospitalizations occurring prior to and during trial, and second, defendant was not entitled to competency hearing, precluding federal habeas relief based on trial court's failure to hold hearing. 28 U.S.C.A. § § 2253(c)(2), 2254(4)(2), (e)(1).

[9] Habeas Corpus 748
197k748 Most Cited Cases

Fact that federal habeas petitioner had received in state court post-conviction proceedings paper hearing on his competency challenge, rather than live hearing as requested, did not satisfy threshold showing of doubt as to competency required for obtaining federal-court competency hearing nunc pro tunc, especially since state trial court and habeas court were one and the same. 28 U.S.C.A. § 2254(e)(1).

[10]Habeas Corpus 771
197k771 Most Cited Cases

State court's competency determination is finding of fact entitled to presumption of correctness under federal habeas corpus statute. 2254(e)(1). 28 U.S.C.A.

[11] Habeas Corpus 748
197k748 Most Cited Cases

Habeas petitioner is entitled to nunc pro tunc evidentiary hearing for purpose of proving that he was incompetent at time he stood trial only when he makes a showing by clear and convincing evidence to raise threshold doubt about his competency. 28 U.S.C.A. § 2254(e)(1).

[12] Sentencing and Punishment 1760
350Hk1760 Most Cited Cases

There is no per se barrier to admission of evidence at sentencing concerning defendant's beliefs associations. U.S.C.A. Const.Amends.1, 1.4.

[13] Constitutional Law 91
92k91 Most Cited Cases

State trial court's admission at sentencing of evidence of defendant's association with self described religious group did not violate defendant's freedom of association; evidence was probative of future dangerousness in light of other evidence supporting prosecution's characteri zation of group as heavily armed paramilitary group. U.S.C.A. Const.Amends. 1, 14; 28 U.S.C.A. § § 2253(c)(2), 2254(d)(1). *447 James William Marcus, Elizabeth Detweiler, Texas Defender Service, Houston, TX, for PetitionerAppellant.

Ann Kraatz, Austin, TX, for Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before JONES, DeMOSS and PARKER, *Circuit Judges*.

DeMOSS, *Circuit Judge*:

Petitioner Thomas Joe Miller-El ("Miller-El"), who was convicted of capital murder in Texas state court and who was sentenced to death therefor, and whose petition for habeas corpus relief and request for a Certificate of Appealability ("COA") therefrom were both denied by the federal district court below, now seeks from this Court a COA pursuant to 28 U.S.C.1 2253(c)(2). For all of the reasons set forth below, we DENY the request for a COA.

I. BACKGROUND

In 1985, Miller-El's wife, Dorothy Miller-El, was employed as a night maid for the lobby area of the Holiday Inn South. She arranged for a religious convention for the Moorish Science Temple's Feast on November 8-10, 1985. Her husband was among the attendees. After the convention, Dorothy did not return to work. Shortly before midnight on November 15, 1985, Dorothy returned to the Holiday Inn claiming that she was there to pick up her paycheck. She was given access to the office area near the vault.

During this time period, four hotel employees were working, Doug Walker, Donald Hall, Anthony Motari, and Mohamed Ali Karimijoji. Hall, the chief auditor, was training Mohamed regarding the hotel's daily closing procedures. Hall instructed Mohamed to close out the cash registers, a process which would take one-half hour. Mohamed encountered a woman who claimed that she needed accompanying while she waited for her ride. Mohamed sent her to the front desk area without leaving the locked area he was in.

At the front desk, a man later identified as Miller-El appeared and requested a room from Hall. Witnesses identified Miller-El from having seen him at the Moorish Feast convention the previous week. A younger man, later identified as Kenneth Flowers and dressed in army fatigues and a headset, peered around the corner as Hall was giving Miller-El his room key, and once spotted by Hall, he also

approached the counter. Miller-El told Hall that he would be needing two beds. Seconds later, Miller-El and Flowers pulled out weapons. Miller-El brandished a semiautomatic "tech" nine millimeter machine *448 gun, with a flash suppressor for night use. Flowers had a .45 caliber hand gun.

Hall complied with Miller-El's instructions to empty the cash drawer and place the money on the counter. Miller-El then ordered Hall to bring any other people in the back out front. Hall instructed Walker to come out. Flowers jumped over the counter and the two men instructed Hall and Walker to lay on the floor. The two men led Hall and Walker to the bellman's closet which they ordered opened. Once the two men removed all of the valuables from the closet and took Walker's and Hall's wallets, Miller-El tied Walker's hands behind his back, tied his legs together, and gagged him with strips of fabric. Flowers did the same to Hall. Walker was laid on his face and Hall was laid on his side.

Miller-El asked Flowers if he was going to "do it" and Flowers responded that he couldn't. Flowers then left. Miller-El stood at Walker's feet, removed his glasses and then shot Walker in the back two times. Hall closed his eyes after the first shot. He heard two more shots and realized that he had also been wounded. Hall tried to talk to Walker but only heard him choking. When he heard familiar voices outside, Hall screamed for help.

Several days after the robbery-murder, Officer Cagle was on surveillance of an apartment complex believed to be Dorothy Miller-El's. He spotted Dorothy and Flowers. With the assistance of back-up units, he stopped their vehicle and arrested them both. Search warrants were executed for the residence, and "walkie-talkie" headsets were found. When Miller-El was later arrested, found in his possession was an arsenal of weapons including the "tech" nine millimeter murder weapon.

II. PROCEDURAL HISTORY

Miller-El pleaded not guilty to and in March 1986 was tried before a jury on the charge of capital murder during the course of committing a robbery.

On March 24, 1986, the jury returned with a guilty verdict and at the conclusion of the sentencing phase, the same jury answered in the affirmative to the special issues set forth in the Texas Code. Accordingly, the trial court imposed upon Miller-El the sentence of death.

Miller-El's conviction and sentence were automatically appealed to the Texas Court of Criminal Appeals. On December 14, 1992, that court affirmed Miller- El's conviction and sentence in an unpublished opinion. See Miller-El v. State, No. 69,677 (Tex.Crim.App.1992)(en banc)(unpublished). And on October 4, 1993, the Supreme Court denied Miller-El's petition for writ of certiorari. See MillerEl v. Texas, 510 U.S. 831, 114 S.Ct. 100, 126 L.E4.24 67 (1993).

Miller-El then filed an application for state habeas relief. The state trial court judge entered findings of fact and conclusions of law recommending denial of Miller-El's state habeas petition. On June 17, 1996, the Texas Court of Criminal Appeals adopted the trial judge's findings of fact and conclusions of law and denied Miller-El's application for state habeas corpus relief. See Ex parte Miller-El, No. 31,001-01 (Tex.Crim.App.1996) (unpublished).

On June 17, 1997, Miller-El filed his petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 in federal district court. On August 12, 1997, Miller-El filed an amended petition for habeas corpus. MillerEl's petition was referred to a magistrate judge who, on January 31, 2000, issued findings and conclusions, recommending a denial of relief. On June 5, 2000, after receiving objections and conducting *449 a hearing on the magistrate judge's report and recommendation,

the district court adopted the magistrate's findings and conclusions and denied Miller-El's petition for a writ of habeas corpus. The district court subsequently denied Miller-El's motion to alter or amend the final judgment denying relief on June 21, 2000. Miller-El then filed a notice of appeal in this Court and a motion for a COA in the district court. On August 14, 2000, the district court denied Miller-El's request for a COA on each of the issues raised herein. It is Miller-El's renewed request for a COA that is presently before us.

III. DISCUSSION

Miller-El seeks from this Court a COA on each of the following issues: (1) whether the district court erred in overruling his challenges of improper peremptory juror strikes; (2) whether the state court erred in failing to conduct a sua sponte evidentiary hearing regarding his competency to stand trial and in finding that he was competent to stand trial in 1986; (3) whether the district court likewise erred in failing to conduct a hearing regarding his competency; and (4) whether the district court erred finding that his First and Fourteenth Amendment rights were not violated by admission of evidence, during the punishment phase of his trial, relating to his affiliation with the Moorish Science Temple.

[1] Miller-El's petition for writ of habeas corpus was filed on June 17, 1997, and is thus governed by the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 11997) ; *United States v. Carter*, 117 F.3d 262 (5th Cir.1997 . Under AEDPA, before an appeal from the dismissal or denial of a§ 2254 habeas petition can proceed, the petitioner must first obtain a COA, which will issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The same standards that governed issuance of the pre-AEDPA version of the COA, the certificate of probable cause ("CPC"), apply to requests for a COA. *See*

Slack v. McDaniel, 529 U.S. 473,120 S.Ct. 1.595, L.Ed.2d .542 2000. A petitioner makes a "substantial showing" when he demonstrates that his petition involves issues which are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are adequate to deserve encouragement to proceed further. *See id.* at 160304.

[2] Additionally, pursuant to § 2254(e)(1), a state court's determination of a factual issue must be presumed correct, and the habeas petitioner bears the burden of rebutting the presumption by clear and convincing evidence. The presumption of correctness is especially strong, where, as here, the trial court and the state habeas court are one and the same. See Clark v. Johnson, 202 F.3d 760, 764 (5th Cir. , cent. denied, 531 U.S. 831, 121 S.Ct. 84, 148 L.Ed.2d 46. (2000).

[3] [4]And while the nature of the penalty in a capital case is an appropriate consideration for determining whether to issue a COA, the severity of the penalty at issue does not, in and of itself, require the issuance of a COA. See Clark, 202 F.3d at 764 (citing Lamb, 179 F.3d at 356). However, in capital cases, doubts as to whether a COA should issue must be resolved in favor of the petitioner. *See Lamb*, 179 F.3d at, 356. Cognizant of the foregoing principles, we turn now to consider those issues raised by Miller-El in his request for a COA.

A.

Miller-El first contends that he is entitled to a COA regarding his challenge to the prosecution's alleged improper use of peremptory strikes to exclude African-Americans from his jury. Miller-El argues that the Supreme Court's decision in *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 1965), is still the applicable law regarding challenges to improper peremptory strikes when evidenced by data

indicating historic, systematic discrimination against African-Americans. However, during the pendency of Miller-El's direct appeal, the Supreme Court decided *Batson v. Kentucky*, 476 U.S. 79,106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), in which it stated that "[t]o the extent that anything in *Swain v. Alabama* is contrary to the principles we articulate today, that decision is overruled." *Batson*, 106 S.Ct. at 1725. Yet Miller-El contends that *Batson* only overruled one part of *Swain*. According to Miller-El, while under Batson, a defendant is no longer required to establish a prima facie case of racial discrimination based upon proof of historical, consistent, and systematic exclusion of African- Americans from juries, if racial discrimination is proffered, nevertheless, under *Swain*, then either the *Swain* or *Batson* evidentiary formulations apply. Miller-El argues that the evidentiary formulation of *Swain* is, thus, applicable to his claim of systematic exclusion. The government contends that the *Batson* evidentiary formulation overruled the Swain formulation on which Miller-El relies.

Under *Swain*, a defendant was required to show the prosecutor's "systematic use of peremptory challenges against Negroes over a period of time" as a predicate. See Swain, 85 S.Ct. at 839. Assuming that a defendant would be able to demonstrate a historical pattern of discrimination continuing unabated to the defendant's trial, the burden would then shift to the prosecutor to rebut the defendant's allegations. *See Alexander v. Louisiana*, 405 U.S. 625, 92 S.Ct. 1.221, 1226, 31 L.Ed.2d 536 (1972). To satisfy his burden, the prosecutor could do one of two things. First, the prosecutor could show that the systematic disparity resulted from racially-neutral selection procedures. Second, the prosecutor could "show neutral reasons for the striking of all the blacks in petitioner's trial itself." *Willis v. Zant*, 720 F.2d 1212, 1220- 21 (11th Cir.1983). However, in any case under Swain, we have held that it is not sufficient to prove a Swain violation based solely on statistical evidence from prior trials

without some concomitant showing that the intentional and systematic discrimination continued "unabated" through to the petitioner's trial. *See Evans v. Cabana*, 821 F.2d 1065, 1068 (5th Cir.1987). Additionally, the prosecutor could rebut the petitioner's showing with a showing of neutral reasons. Miller-El argues that his showing under *Swain* requires only a showing of historical and systematic discrimination in order to establish a prima facie case.

In *Batson*, the Supreme Court, recognizing the "crippling burden of proof' which Swain created, replaced the *Swain* evidentiary formulation with the new Batson standard. That new standard involves the following three steps:

> First: A defendant can establish his prima facie case of purposeful discriminatory petit jury selection solely upon evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. Alternatively, the defendant can make a prima facie case by proving historic, systematic discrimination;
>
> Second: If a defendant makes a prima facie showing, the burden then shifts to the government to provide a race-*451 neutral explanation for challenging the excluded jurors;
>
> Third: The trial court must then determine if the defendant has established purposeful discrimination, and the trial court's determination is a finding fact entitled to the applicable level of deference on appellate review.

See Batson, 106 S.Ct. at 1723-24.

Despite Miller-El's contention that the *Swain* evidentiary framework was untouched by *Batson*, the Supreme Court has itself explicitly stated "we reject [*Swain's*] evidentiary formulation as inconsistent with standards that have been developed since Swain for assessing a prima facie case under the Equal Protection Clause." *Id. at* 1721; *see also Georgia v.*

McCollum, 505 U.S. 42,112 S.Ct. 2348, 120 L.Ed.2d 33 (1992) (stating that "[i]n *Batson v. Kentucky*, [ ]the Court discarded *Swain's* evidentiary formulation").

With respect to the second step in the Batson analysis, the Court stated specifically:

> Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's [race-neutral] explanation need not rise to the level justifying exercise of a challenge for cause.

Batson, 106 S.Ct. at 1723. Miller-El suggests that contrary to the above language in step two of the *Batson* evidentiary framework, the level of explanation required to rebut the prima facie case is governed by the rebuttal stage of the evidentiary formulation of *Swain* and is a "heavy burden." However, as we have noted, the Supreme Court has explicitly overruled the evidentiary formulation of Swain to the extent that it would contradict any principle, evidentiary or otherwise, announced in *Batson*. See id. at 1725. Thus, to the extent that the two burdens of rebuttal in *Swain* and *Batson* are inconsistent, the Supreme Court has mandated that the standard in Batson be applied. Here, Batson was decided during the pendency of Miller-El's direct appeal, and it is, thus, the applicable standard for analyzing his challenge to the use of peremptory juror strikes. *See Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) (holding that Batson governs claims by defendants whose appeals were pending and non-final at the time Batson was decided).

[5] Miller-El contends that the state court's adjudication was an unreasonable application of Batson and that the court's findings were also unreasonable in light of his prima facie showing. His primary challenge is to the district court's alleged failure to give proper weight and credit to the evidence which he presented regarding the historical data evidencing exclusion of African-American jurors.

The state court findings in this case on the issue of discriminatory intent, despite Miller-El's protestations to the contrary, are entitled to great deference. *See Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, L.Ed.2d 395 (1991). As an appellate court reviewing a federal habeas petition, we are required by 2254(d)(2) to presume the state court findings correct unless we determine that the findings result in a decision which is unreasonable in light of the evidence presented. And the unreasonableness, if any, must be established by clear and convincing evidence. See 28 U.S.C. § 2254(e)(l).

The detailed factual findings made by the state trial court establish that each of the challenged AfricanAmerican jurors *452 was stricken on race- neutral grounds. Miller-El has addressed the peremptory challenge of six of the ten Batson jurors in his request for a COA. We have now conducted an independent review of the findings of the state court and of the evidence presented by Miller-El in his application. Suffice it to say, and without commenting on each of the challenged jurors and the reasons proffered for their being excluded, we find that the state court's findings are not unreasonable and that Miller-El has failed to present clear and convincing evidence to the contrary. The findings of the state court that there was no disparate questioning of the Batson jurors and that the prosecution's reasons for striking the jurors was due to their reluctance to assess and/or their reservations concerning the death penalty are fully supported by the record.

Having determined that the state court's adjudication neither resulted in a decision that was unreasonable in light of the evidence presented nor resulted in a decision contrary to

clearly established federal law as determined by the Supreme Court, we conclude that this issue would not be debatable among jurists of reason, that courts could not resolve the issues in a different manner, and that the issue does not deserve encouragement to proceed further. Miller-El has thus failed to make a substantial showing of the denial of a constitutional right. Accordingly, we deny MillerEl's request for a COA on this issue.

B.

Miller-El's second issue consists of two parts that revolve around his claim that he was incompetent to stand trial. He first claims that the state trial court erred in failing to provide him with a sua sponte evidentiary hearing pursuant to *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). Second, he challenges his conviction as infirm under *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960), on the basis that he was incompetent, in fact, at the time of his trial. Before analyzing these claims, a brief review of some additional facts is necessary.

Miller-El was tried some eight weeks following his arrest. Incident to his arrest, Miller-El was wounded by a gunshot. During the months following his arrest, Miller-El underwent surgical treatment for his injuries, and he experienced complications such as weight loss. On three separate occasions during his trial, Miller-El was evaluated by a doctor at the direction of the trial court. First, during jury selection, he experienced chest pains, chills, and a fever. He was diagnosed with pneumonia and was treated and discharged the same day. Nine days later, still during jury selection, Miller-El complained of delays in receiving medication. The trial court ordered a second evaluation to determine if Miller-El needed more medication. The doctor determined that he did not. Two days before jury selection concluded, Miller- El was taken to the hospital for treatment of a chest abscess. During his trial, MillerEl complained of pain in his ribs and

asked to see a doctor. And finally, on the evening of the day he was found guilty, the trial judge ordered a medical evaluation to determine if Miller-El would be able to sit through court after complaining of nausea and colostomy bag complications. He was kept overnight in the hospital and was released the next day when the punishment phase of his trial began.

Miller-El complains that he was denied a competency hearing at trial and that his due process rights were denied because whenever evidence raises a sufficient doubt about the mental capacity of the '453 accused to stand trial, a hearing is required. *See Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 908, ,43 L.Ed.2d 103 (1975); Pate, 383 U.S. 375, 86 S.Ct. 836. Miller- El contends that the evidence raised a sufficient doubt as to his competency.

[6][7] In *Carter v. Johnson*, 110 F.3d 1098 (5th Cir.1997 , we explained the procedural inquiries and burdens required for the two competency claims Miller-El asserts. Specifically, we summarized as follows:

> The issue of competency may arise in two distinct contexts. *See United States v. Williams*, 81.9 F.2d 605, 607-09 (5th Cir.1987); *Lokos v. Capes*, 625 F.2d 1258, 1261-62 (5th Cir.1980). We must distinguish between them for purposes of the present case.
>
> First, a habeas petitioner may allege that state procedures were inadequate to ensure that he was competent to stand trial. A trial court must conduct an inquiry into the defendant's mental capacity sua sponte if the evidence raises a bona fide doubt as to competency. *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836,15 L.Ed.2d 815 (1966). If the trial court receives evidence, viewed objectively, that should raise a reasonable doubt as to competency, yet fails to make

further inquiry, this constitutes a denial of a fair trial. *See Lokos*, 625 F.2d at 1261.

If a Pate violation is established, the federal habeas court must consider whether a meaningful hearing can be held nunc pro tunc to determine retrospectively the petitioner's competency as of the time of trial. *Id.* at 1262. If so, the petitioner bears the burden of proving his incompetence by a preponderance of the evidence; if not, the habeas writ must issue, subject to retrial at the state's discretion. *Id.* This *Pate* procedural guarantee is not before us, having been expressly abandoned by Carter on appeal.

Second, a habeas petitioner may collaterally attack his state conviction by directly alleging incompetence at the time of trial, thereby claiming a violation of the substantive right not to be tried and convicted while incompetent, rather than of the procedural guarantee of a competency hearing in the event that a bona fide doubt arises at trial as to competency:

> It is always open for the defendant to later assert his actual incompetence at trial in a subsequent collateral proceeding, but the substantive claim should not be confused with a defendant's procedural rights under Pate to a hearing whenever a bona fide doubt as to competence surfaces at trial.

Carter v. Johnson, 131 F.3d 452, 458 n. 10 Cir.1997).

[8] First, with respect to whether Miller-El was entitled to a hearing, the relevant inquiry is whether the district court received information "which, if objectively considered, should reasonably have raised a doubt about the defendant's competency and alerted [it] to the possibility that the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense." *Lokos*, 625 F.2d at 1261. In this case, the trial

court specifically found that Miller-El was competent to stand trial, both at the trial and again on state habeas review. Specifically the court found:

> (1) petitioner was legally competent both on and off his pain medication; (2) he had the capacity to understand the nature and object of the proceedings against him, consult with his attorneys, and assist in the preparation of his defense; and (3) a competency hearing *454 was not required because "there was no 'bona fide doubt' as to [petitioner's] competence to stand trial."

Our independent review of. the record evidence convinces us that the district court's finding that Miller-El was not entitled to a hearing is not unreasonable, and Miller-El has failed to present clear and convincing evidence to the contrary.

With respect to whether Miller-El was, in fact, incompetent, we find that the district court's conclusion that he was not, is reasonable, and likewise, we find that the state court's decision does not represent an unreasonable application of federal law. Thus, we conclude that Miller-El has failed to make a substantial showing of the denial of a constitutional right, and we deny Miller-El's request for a COA on this issue.

C.

[9] In his third issue, Miller-El claims that he is entitled to a COA because the federal district court erred in refusing to conduct an evidentiary hearing nunc pro tune to determine whether he was competent to stand trial in 1986. Having concluded above that Miller-El has failed to establish a bona fide doubt as to his competency at trial under Pate and that the state court's determination of competence was reasonable, we need not readdress this issue.

[10][11] A state court's competency determination is a finding of fact entitled to a presumption of correctness under 2254(d)(2). And we have stated that "[b]efore the federal district court has a duty to investigate a habeas petitioner's claim of incompetency, the petitioner must show that there are sufficient facts to 'positively, unequivocally and clearly generate a real, substantial and legitimate doubt as to the mental capacity of the petitioner to meaningfully participate and cooperate with counsel during trial.' " *Moody v. Johnson*, 139 F.3d 477, 481 (5th Cir.1998) (quoting *Washington v. Johnson*, 90 F.3d 945, 950 (5th Cir.1996)). Under Section 2254(e)(1), a habeas petitioner is entitled to a nunc pro tune evidentiary hearing for the purpose of proving that he was incompetent at the time he stood trial only when he "makes a showing by clear and convincing evidence to raise a threshold doubt about his competency." *Lokos*, 625 F.2d at 1261. This threshold burden is "extremely heavy," *Johnson v. Estelle*, 704 F.2d 232, 238 (5th Cir.1983), and requires that a petitioner present facts sufficient to "positively, unequivocally, and clearly generate a real, substantial and legitimate doubt" concerning his mental competence, id. at 238. *See also Jackson v. Anderson*, 112 F.3d 823 (5th Cir.1997) (noting that I 2254(e 1. places a heavier burden on petitioners seeking to rebut state court fact findings).

Miller-El suggests that he was entitled to an evidentiary hearing in the federal district court because he was not given a live hearing in the state court. The state habeas court instead based its decisions upon the parties' supplemental briefing and expert affidavits, i.e., Miller-El received only a paper hearing. We find Miller-El's suggestion untenable, especially where, as here, the trial judge and the state habeas judge were the same. See Clark v. Johnson, 202 F.3d at 766 ("we have repeatedly found that a paper hearing is sufficient to afford a petitioner a full and fair hearing on the factual issues underlying the petitioner's claims, especially where . . . the trial court and the state habeas court were one in the same.").

We conclude that Miller-El has failed to make a substantial showing of the denial of a constitutional right on this issue in that he has failed to rebut the presumptive '455 correctness of the state habeas and district court findings that he was competent to stand trial in 1986 and that he was not entitled to a nunc pro tune hearing to determine competency. Accordingly, we deny Miller-El's request for a COA on this issue.

D.

[12] In his fourth and final issue, Miller-El argues that he is entitled to a COA on his claim that his First and Fourteenth Amendment rights were violated by the admission of evidence, during the punishment phase of his trial, relating to his affiliation with the Moorish Science Temple faith in violation of *Dawson v. Delaware*, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992). In *Dawson*, while the Supreme Court held that where religious affiliation unrelated to any issue in the case may be impermissible, there is no "per se" barrier to the admission of evidence which concerns a defendant's beliefs and associations at sentencing. *Dawson*, 112 S.Ct. at 1097. The Court noted that "[i]n many cases ... associational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to society." *Id.* at 166, 112 S.Ct. 1093. We have, likewise, held that if the evidence regarding a defendant's affiliations or personal beliefs is sufficiently related to the issues involved, there is no constitutional violation. *See Boyle v. Johnson*, 93 F.3d 180, 183-84 (5th Cir.1996).

[13] Here the state habeas court concluded that Miller-El's association with the Moorish Science Temple was inextricably intertwined with his conviction and sentence. Evidence was entered in the guilt phase regarding his membership as part of testimony regarding witnesses' ability to identify him through his participation in the Moorish Temple Feast at the murder scene the week before the

robbery-murder. Thus, introduction of this evidence during the guilt phase was relevant to other matters.

The additional references to his membership during the punishment phase of his trial, as the state court found, were appropriate as they related to his involvement with other group members who were heavily armed and who assisted in the commission of Miller-El's offense of conviction. The government's characterization of Miller-El as belonging to a heavily armed paramilitary group was supported by the evidence and was probative as an indicator of future dangerousness.

Having conducted an independent review, we conclude simply that the state court's determination that Miller-El's due process rights were not violated by the prosecution's reference to his membership in the Moorish Science Temple faith was consistent with and was not contrary to the Supreme Court's applicable holding in *Dawson*. Furthermore, we conclude that the state court's adjudication of this claim was reasonable, and therefore, we deny MillerEl's request for a COA on this issue.

IV. CONCLUSION

Having carefully reviewed the record, we conclude that Miller-El has failed to make a substantial showing of the denial of a constitutional right with respect to any of the issues raised in his request for COA, and accordingly, we DENY his request for COA on all issues raised therein.

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Supreme Court, U.S.
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No. 01-7662

IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Did the Court of Appeals err in denying a certificate of appealability and in evaluating petitioner's claim under *Batson v. Kentucky*?

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OPINIONS BELOW

The opinion of the court of appeals (JA 948-67) is reported at 261 F.3d 445. The opinion of the district court (JA 942-47) and the findings and recommendations of the magistrate judge that it adopts (JA 898-941) are unreported. The opinion of the Texas Court of Criminal Appeals abating petitioner's appeal and remanding it to the trial court (JA 832-36) is reported at 748 S.W.2d 459. The state trial court's findings of fact and conclusions of law after abatement of the appeal (JA 873-79) and the second opinion of the Texas Court of Criminal Appeals (JA 880-97) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 2001. The petition for certiorari was filed on December 11, 2001, and granted on February 15, 2002. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment and 28 U.S.C. §§ 2253(c), 2254(d), and 2254(e)(1) are set forth at App., *infra*, 1a-2a.

INTRODUCTION

In 1986, when petitioner Miller-El—an African American—was tried, convicted, and sentenced to death, prosecutors in Dallas County, Texas, actively excluded African Americans from jury service. From 1951 until his long tenure ended in 1987, Dallas County District Attorney Henry Wade employed a policy of racial discrimination in jury selection that was properly labeled "appalling" by the federal magistrate judge in this case. A state judge who had served under Wade as an Assistant District Attorney reported that Wade had instructed him never to allow an African American to serve on a criminal jury. Two separate training manuals developed in Wade's regime and distributed to Assistant District Attorneys into the 1980s explicitly directed prosecutors to exclude all minorities, including African Americans, from petit juries. The prosecutors who selected

petitioner's jury were trained with those materials, and both were part of prosecution teams found by the Texas courts to have discriminated against African Americans in jury selection in two other cases tried within months of petitioner's trial. In petitioner's case, those prosecutors used peremptory challenges to strike ten of eleven qualified African Americans from the venire. The record demonstrates that they also engaged in racially motivated use of other jury selection tools, including a device called a jury "shuffle" and discriminatory questioning and for-cause challenges designed to eliminate African Americans from petitioner's jury.

This case, therefore, comes to this Court from a dark chapter of blatant and open racial discrimination in jury selection that, it can perhaps be said with confidence, has finally closed in this country. Shortly after petitioner's conviction, this Court decided *Batson v. Kentucky*, 476 U.S. 79 (1986), which sought to make meaningful the Constitution's prohibition against intentional race discrimination in jury selection. As a result of *Batson*, there will presumably be no more Henry Wades, and no more government training materials advocating race discrimination in jury selection. But this case is extremely important nonetheless. If the blatant discrimination patent in this record is not condemned, then the subtler forms of unconstitutional race discrimination that sometimes, regrettably, occur in jury selection in our own era are much more likely to go undeterred. By confirming that the appalling discrimination practiced here violates the Constitution, the Court can make certain that the message of *Batson* remains clear.

STATEMENT OF THE CASE

This case involves the question whether the State's use of peremptory challenges to strike ten of the eleven African Americans qualified to serve on petitioner's jury was impermissibly based on race under this Court's ruling in *Batson*.

Official Policy and Practice of Discrimination in Jury Composition in Dallas County, Texas

1. At the time of trial in this case, Dallas County's extensive record of race discrimination in jury selection was well documented. In *Hill v. Texas*, 316 U.S. 400 (1942), this Court addressed practices that, prior to 1940, completely excluded African Americans from county grand juries. Noting that "chance or accident could hardly have accounted for the continuous omission of negroes from the grand jury lists for so long a period," the Court concluded that Dallas County jury commissioners had "discriminate[d] in the selection of jurors on racial grounds." *Id.* at 404. In *Cassell v. Texas*, 339 U.S. 282, 286 (1950), this Court concluded that "subsequent to the *Hill* case the Dallas County grand-jury commissioners . . . consistently limited Negroes selected for grand-jury service to not more than one on each grand jury." Thus, this Court held, Dallas County continued unconstitutionally to discriminate against African Americans with respect to grand jury service.

2. Henry Wade was first elected Dallas County District Attorney ("DA") in 1951, the year after *Cassell* was decided, and served until 1987, the year after petitioner was convicted. JA 699, 709, 817. According to a *Dallas Morning News* study published shortly before petitioner's trial (and before the state courts in this case), despite *Hill* and *Cassell*, the Dallas County DA's office engaged throughout Wade's tenure in a consistent practice of striking African Americans from petit juries in serious criminal cases, particularly where the defendant was African American. JA 709. The story quoted District Judge Jack Hampton, who had served on Wade's staff from 1958 to 1962, as saying that after he once allowed an African American woman to serve as a juror in a criminal case that eventually ended in mistrial, Wade reprimanded him: "If you ever put another nigger on a jury, you're fired." *Id.*

In the 1960s and 70s, Wade's office formally trained its prosecutors to use race in jury selection. A 1963 manual

instructed prosecutors to exercise peremptory strikes against African Americans and members of other minority groups: "'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated . . . . [T]hey will not do on juries.'" JA 710.

In 1969, Assistant DA John Sparling drafted another manual. Used in training sessions (JA 739-40, 795-96, 799-800, 804-06) and distributed to incoming prosecutors under the title "Jury Selection in a Criminal Case," JA 30, the manual advised that selection of jurors should "depend on . . . the age, color and sex of the Defendant," *id.*, and that prosecutors should exclude "any member of a minority group which may subject him to oppression," JA 32. According to the manual, "[m]inority races almost always empathize with the Defendant." JA 33. The Sparling manual served as a training tool into the 1980s, *see Ex Parte Haliburton*, 755 S.W.2d 131, 133 n.4 (Tex. Crim. App. 1988), and was therefore part of the training given to the prosecutors who handled jury selection in petitioner's case.[1]

3. Studies conducted by the *Dallas Morning News* in 1986 showed that discriminatory jury selection practices in Dallas County continued unabated in the 1980s. One study analyzed 100 randomly selected felony jury trials conducted in Dallas County between 1982 and 1984. JA 702. It demonstrated that prosecutors "routinely manipulate[d] the racial composition of juries through their use of peremptory challenges." JA 698. In the 100 trials studied (which involved approximately 4,434 prospective jurors), prosecutors eliminated 92% of the African Americans by peremptory strikes. JA 698-99. Consequently, although

[1] The prosecutors who conducted jury selection in petitioner's case were Assistant District Attorneys Paul Macaluso and James Nelson. Macaluso joined the Dallas County DA's office in the early 1970s. *See* JA 848. Nelson joined the office in 1980. *See* http://www.lockeliddell.com (website of Nelson's current firm, which lists his professional background). Thus, both joined the office while the Sparling manual was used to train new prosecutors.

African Americans comprised 18% of the Dallas County population in 1986, they accounted for fewer than 4% of jurors in felony trials. JA 698.

Another *Dallas Morning News* study revealed that, almost exclusively due to prosecutors' use of peremptory strikes, nine out of every ten African Americans qualified to serve on capital murder juries between 1980 and 1986 were never permitted to do so. JA 815. In the fifteen capital trials studied, prosecutors were responsible for striking 98% of the African Americans eliminated from jury service by peremptory strikes. *Id.* When combined with the prosecution's use of for-cause challenges, this practice meant that only one in twelve African American veniremembers were selected as jurors in Dallas County capital cases between 1980 and 1986, compared to a rate of one in three for whites and one in four for Latinos. JA 816.

The prosecutors who handled jury selection in petitioner's case—Paul Macaluso and James Nelson—engaged in discriminatory jury selection tactics in other cases in the same time period, leading to the reversal of two convictions on *Batson* grounds. In a case tried shortly before petitioner's, Macaluso was found to have engaged in disparate questioning on the basis of race, to have used peremptory strikes improperly to exclude African Americans, and to have offered false, pretextual explanations for his actions in selecting the jury in that case. *See Chambers v. State*, 784 S.W.2d 29, 31-32 (Tex. Crim. App. 1989) (en banc). Nelson was lead prosecutor in the trial of petitioner's wife just three months after petitioner's trial, in which the prosecution's purported race-neutral reason for one of its peremptory strikes was found to be a pretext for purposeful racial discrimination. *See Miller-El v. State*, 790 S.W.2d 351, 357 (Tex. App.—Dallas 1990).[2]

[2] Following this Court's decision in *Batson*, several other Dallas County criminal convictions were overturned on the grounds that prosecutors had used peremptory challenges improperly to remove

State Court Proceedings

1. Petitioner's jury was selected in February and March, 1986, in the context of this documented past and continuing practice of racial discrimination. Twenty of the 108 veniremembers individually reviewed by the prosecution and defense were African Americans. Nine of those African Americans were removed either by agreement of the parties or by the court for cause. Of the eleven qualified African American veniremembers that remained, prosecutors Macaluso and Nelson used ten of their fourteen peremptory strikes to remove all but one.[3] The prosecution thus used peremptories to strike 91% of the African Americans qualified to serve on petitioner's jury. In contrast, the prosecutors peremptorily removed only four—or 13%—of thirty-one qualified non-African Americans.[4]

Petitioner responded by moving, based on *Swain v. Alabama*, 380 U.S. 202 (1965), to strike the jury due to purposeful racial discrimination by the prosecution. At the hearing on that motion, petitioner introduced evidence that the racial disparity in the prosecution's use of peremptory challenges here was consistent with a longstanding pattern and practice of discrimination by the Dallas County DA's

African American veniremembers. *See, e.g., Young v. State*, 848 S.W.2d 203 (Tex. App.—Dallas 1992); *Ramirez v. State*, 862 S.W.2d 648 (Tex. App.—Dallas 1993); *Chivers v. State*, 796 S.W.2d 529 (Tex. App—Dallas 1990, pet. ref'd); *Hill v. State*, 827 S.W.2d 860 (Tex. Crim. App.) (en banc), *cert. denied*, 506 U.S. 905 (1992); *C.E.J. v. State*, 788 S.W.2d 849 (Tex. App.—Dallas 1990, writ denied); *Vann v. State*, 788 S.W.2d 899 (Tex. App.—Dallas 1990, pet. ref'd); *Reich-Bacot v. State*, 789 S.W.2d 401 (Tex. App.—Dallas 1990); *Crouch v. State*, 1993 WL 265424 (Tex. App.—Dallas, July 12, 1993, pet. ref'd).

[3] Each side was permitted to exercise up to fifteen peremptory strikes. The State's strikes of African Americans are found at JA 101 (Roderick Bozeman), 131 (Billy Jean Fields), 154 (Joe Warren), 186 (Edwin Rand), 210 (Carrol Boggess), 248 (Wayman Kennedy), 566 (Linda Baker), 634 (Janice Mackey), 643 (Paul Bailey), 675 (Anna Keaton).

[4] JA 359 (Margaret Gibson), 382 (James Holtz), 396 (Penny Crowson), 619 (Charlotte Whaley).

office. That evidence included the initial *Morning News* study discussed above, JA 753, and the discriminatory training materials used by the county DA's office, JA 740-41. Petitioner also presented several witnesses, including three state judges and a public defender, who testified to the dearth of empanelled African American jurors in Dallas County cases and the pervasiveness of racially discriminatory jury selection practices on the part of county prosecutors.[5]

Consistent with the *Morning News* story described above, Judge Jack Hampton testified that either Henry Wade or his first assistant told him that he would be fired if he put another African American on a jury. Judge Hampton also testified that he could not recall allowing an African American to serve on a jury after receiving that instruction and that he would not have done so unless he had run out of peremptory strikes. JA 759-60, 766-67. Judge Hampton explained that prosecutors "didn't talk much about" the policy of excluding African Americans from jury service, but "from observation that is what happened." JA 760.

Judges Harold Entz and Larry Baraka testified about exclusionary techniques employed by prosecutors in their courtrooms. Judge Entz testified that one prosecutor *admitted* that he had asked for a "jury shuffle"—a procedure sanctioned by state law and designed to rearrange the order in which potential jurors appear for voir dire, *see infra* at 10-11—"because a predominant number of the first six, eight, or ten jurors were blacks." JA 788. Judge Baraka testified about prosecutors' widespread use of racially motivated peremptory strikes, reporting that, after one 1985 case, he had barred a prosecutor who had used all of his peremptory challenges to strike African Americans from conducting similar jury selections in his courtroom. JA 769. Based on his observations in that and other cases, Judge Baraka

[5] Other witnesses, including current members of the office, either denied that the office discriminated or were less definitive in describing its racial biases.

concluded that African Americans had been systematically excluded from juries in Dallas County. JA 770-71.

Ralph Tait, Chief Public Defender for Dallas County, discussed local prosecutors' conduct from the perspective of the defense bar. He explained that prosecutors' discriminatory tactics were so predictable that defense counsel rarely planned to use any of their own peremptory strikes to remove African American veniremembers they regarded as undesirable. JA 777. Tait testified that defense attorneys confidently assumed that the State would remove even pro-prosecution African Americans, and thus defense counsel would not reserve strikes to remove such jurors as jury selection progressed. *Id.*

The trial court denied petitioner's motion to strike the jury, finding "no evidence . . . that indicated any systematic exclusion of blacks as a matter of policy by the District Attorney's office; while it may have been done by individual prosecutors in individual cases." JA 813.

2. Following his conviction and death sentence, petitioner pursued his claim of race discrimination in the State's peremptory strikes to the Texas Court of Criminal Appeals. Soon after petitioner's appeal was docketed, this Court decided *Batson*, which "reexamin[ed] . . . the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." 476 U.S. at 82. *Batson* established a three-part analysis pursuant to which the courts must determine whether the prosecution engaged in "purposeful discrimination." *Id.* at 97-99.

Two years later, the Court of Criminal Appeals abated petitioner's appeal and remanded his case to the trial court for a hearing under *Batson*. The court held that the circumstances "sufficiently raised the issue of the State's use of peremptory strikes at trial to invoke *Batson*." JA 833. The court also concluded that petitioner had "established an

inference [of discrimination] as required by . . . *Batson*," noting that "the prosecutor exercised ten of fourteen peremptory challenges to exclude members of [petitioner's] race," and that, "in using such a skewed number of strikes on the black veniremen, ten of the eleven prospective black jurors were peremptorily struck." JA 835. The court remanded the case for a determination "whether there was racial motivation in the prosecutor's actions." *Id.*

The judge who had presided over petitioner's trial then conducted a *Batson* hearing and, despite the Court of Criminal Appeals' conclusion that petitioner had already made out a prima facie case, required petitioner to re-submit evidence that "discrimination was invoked in the State's striking of certain jurors." JA 838-39. Accordingly, petitioner re-introduced evidence showing that the DA's office had engaged in a pattern and practice of purposeful racial discrimination at the jury selection phase of numerous past and contemporaneous cases. JA 839-41.[6] Also before the court was record evidence demonstrating that the prosecution had used a number of tactics, including peremptory strikes, to exclude African Americans from his jury. JA 839-40.[7] The prosecution asked that the court incorporate into the record the explanations it had given during voir dire for its peremptory strikes of certain African American jurors. JA 851-52. Prosecutor Macaluso also articulated reasons for two peremptories that had not been discussed during voir dire. *See id.*

3. The record showed that, consistent with the pattern and practice evidence from other cases, prosecutors Macaluso and Nelson employed a number of strategies to

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[6] The prosecution objected to the re-introduction of this evidence. JA 841-42. The court admitted the evidence but suggested that it might ultimately accord it little or no weight. JA 843-44.

[7] The trial court indicated that it would consider "all of the voir dire including the composition of the jury, the agreements to excuse," and its own recollection and notes. JA 847; *see also* JA 870-71.

prevent African Americans from serving on petitioner's jury. They attempted to manipulate the "jury shuffle" process in a manner evidencing race discrimination, and consistently questioned African American jurors differently than white jurors in an apparent effort to establish a basis for a for-cause removal. The record also showed that, as in other cases, the "racially neutral" explanations offered by Macaluso and Nelson for their decisions to strike African American jurors applied equally to white jurors the prosecutors did not strike.

a. *The State's Attempted Manipulation of the Jury Shuffle Process To Remove African Americans.* Texas law affords attorneys in criminal cases the opportunity to change the order in which potential jurors are presented for voir dire, and therefore for jury selection. At the time of petitioner's trial, the statutory provision addressing this procedure, commonly called a "jury shuffle," provided:

> The trial judge, on the demand of the defendant . . . or the State's counsel, shall cause the names of all the members of the general panel drawn or assigned as jurors in such case to be placed in a receptacle and well[-]shaken, and the clerk shall draw therefrom the names of a sufficient number of jurors from which a jury may be selected to try such case, and such names shall be written, in the order drawn, on the jury list from which the jury is to be selected to try such case.

Tex. Crim. Proc. Code Ann. Art. 35.11 (Vernon 1989).[8] Jury shuffles occur prior to the start of any voir dire, when the only available information about potential jurors comes from juror information cards and what attorneys can glean from physical appearances.[9] As a result, jury shuffles function as a

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8 Article 35.11 has since been amended. *See* Acts 1991, 72d Leg., Ch. 337, § 1, eff. Sept. 1, 1999.

9 Juror information cards typically indicate a potential juror's name, place of birth, marital status, number of children, employer and work history, place and duration of residence, spouse, occupation, address and telephone number, and prior jury service, among other things. *See* JL 54-108. In addition, prosecutors Macaluso and Nelson annotated the cards by hand with codes that indicated the race of each juror. *Id.* The prosecutors were thus able to track the race of the members of each week's venire pool, and to plan their jury selection strategies accordingly.

device for moving forward veniremembers who are "visually preferred" to increase the chances of their selection, and for "placing visually non-preferred venire members later" in the seating to minimize the chance that they will ultimately be empanelled as jurors. *Ford v. State*, 2002 WL 811311, at *5 (Tex. Crim. App. May 1, 2002) (Holcomb, J., dissenting). As Judge Entz testified during the *Swain* hearing in this case, the Dallas County DA's office used jury shuffles to affect the racial composition of juries. JA 788.

The prosecutors plainly attempted to use the jury shuffle procedure in this case to reduce the number of African Americans who would be subjected to voir dire. Jury selection took place over the course of approximately five weeks. At the beginning of each week, the court called a panel consisting of forty to fifty members, each of whom was assigned a number. *See, e.g.*, JA 46-47. Unless chosen for the jury, the veniremembers' service obligations did not extend past the end of the week. *Id.* Voir dire occurred in numerical order, in groups of six or fewer per day. *See, e.g.*, *Id.* Consequently, a significant proportion of each venire panel would not be interviewed by the end of the week, and the trial judge routinely dismissed the last fifteen or more members before they even completed a jury questionnaire. *See, e.g.*, JA 50-51. Prospective jurors toward the beginning of a list thus were far more likely to be empanelled than those toward the end.

Both the State and the defense requested shuffles in the first week of voir dire, but the record does not reflect the racial composition or order of presentation of the venire panel. *See, e.g.*, JA 45-46.[10] In the second week, the State

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10 At the time of petitioner's trial, Texas law permitted the State and the defense to request a jury shuffle of every panel presented for voir dire.

again requested a jury shuffle, and refused to provide a reason for doing so. Defense counsel then described the composition of the panel: "I would like the record to indicate that within the first ten jurors . . . four are black. Within the second set . . . three are black and within the third set . . . two are black and [in] the fourth set . . . one is black." JA 48. The trial court instructed that the shuffle be performed "as quickly as possible." *Id.* After the shuffle, the first ten members of the venire included two African Americans; the second ten included one African American; the third ten included three African Americans; and the fourth and final ten included four African Americans. JL 62-71.

When initially seated, the third week's venire panel included African Americans in seats 1, 2, 3, 4, 8, and 15. JA 61-62. The State requested a shuffle. After the State's shuffle, the position of those same African American jurors had changed to 19, 26, 36, 37, 38, and 39. *Id.* The defense then exercised its jury shuffle right, after which the African American jurors again appeared near the beginning of the panel in positions 1, 2, 3, 4, 7, and 14. JA 62. At this point, the prosecution informed the judge that it objected to the defense's shuffle. JA 56-65. Although they had not raised the issue before the shuffle was conducted, prosecutors Macaluso and Nelson demanded a re-shuffle ostensibly because the defense counsel's shuffle had been performed outside the courtroom in the central jury room. JA 57. Defense counsel objected, pointing out that the State's own shuffles had been conducted in precisely the same manner and at precisely the same location, and suggested that the State's protest stemmed from a concern about the presence of African Americans in the first part of the venire. JA 60-62. The trial court denied the State's request. The jury was filled

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Under current law, only one shuffle per panel may be conducted. *See Chappell v. State*, 850 S.W.2d 508, 510-11 (Tex. Crim. App. 1993).

during the fifth week of voir dire; the final juror seated was the 108th veniremember reviewed.[11]

b. *Disparate Questioning Designed To Develop For-Cause Challenges to African Americans.* Although a total of 108 veniremembers (including twenty African Americans) were reviewed by the parties, not all were subjected to voir dire. Rather, the court excused three members of the venire for cause prior to questioning, and the parties jointly agreed to remove thirty-nine others, including five African Americans.[12] Thus, a total of sixty-six veniremembers were subject to full voir dire, including forty-nine whites, fifteen African Americans, one Asian American, and one Latino.

Prosecutors Macaluso and Nelson systematically questioned African American veniremembers differently than white veniremembers in an obvious effort to establish a basis to remove African Americans for cause. Indeed, although only three African Americans were ultimately removed for cause, the prosecution moved to strike for cause nine—or 60%—of the fifteen who were questioned.[13]

The prosecutors' disparate examination of African American veniremembers focused on two for-cause areas. The first concerned potential jurors' feelings about the death penalty. At the outset of each voir dire, the prosecution asked veniremembers of all races whether in their view the death penalty served a societal purpose, and how they felt about serving in a death penalty case. The script for these questions, however, differed considerably according to the

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11 A total of thirteen jurors were selected. One of those selected, white juror Mary Sumrow, was subsequently excused for medical reasons.

12 A few of these thirty-nine veniremembers were subjected to brief preliminary questioning prior to being removed by joint agreement. *See, e.g.*, JA 373 (Hilbert Gitchoway).

13 *See* JA 173 (Rand), 375 (Virginia Smith), 475 (Jeannette Butler), 476 (Louise Carter), 230 (Kennedy), 634 (Janice Mackey), 642 (Bailey); App. 4a (Jerry Mosley), App. 7a-8a (Keaton). The court granted the State's motions as to Smith, Butler, and Carter. Mosley was subsequently removed by agreement. *See* App.5a-6a.

race of the veniremember. With eight of the fifteen African Americans, the prosecution began with a graphic script describing the physical mechanics of an execution—presumably to prompt more negative feelings about service in a death case.[14] The prosecution opened with this formulation even where the particular African American veniremember had already, in the written questionnaire, expressed support for the death penalty.[15] For the vast majority of white veniremembers, in contrast, the prosecution used a formulation that explored their feelings about serving on a capital jury in only the vaguest of terms.[16] The prosecution employed the graphic formulation at the outset of questioning with only three of the forty-nine white veniremembers subjected to voir dire, and two of those had already expressed clear opposition to the death penalty in their written questionnaires.[17]

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[14] *See* JA 473-75 (Butler), 480-81 (Boggess), 214-16 (Kennedy), 560-62 (Baker), 251-53 (Troy Woods), 631-33 (Mackey), 640-42 (Bailey), 672-75 (Keaton).

[15] *See* JA 560-62 (Baker), 480-81 (Boggess), 214-16 (Kennedy).

[16] *See* JA 273-74 (Cynthia Young), 275-77 (Dennis Merrell), 278-80 (Don Hambrick), 284-85 (Emily Williams), 287-88 (Darol Weigant), 353-55 (Gibson), 360-62 (Carol Taylor), 365-66 (John Nelson), 367-68 (Harold Sohner), 369-70 (Billy Wagoner), 376-77 (Holtz), 384-85 (Sandra Jenkins), 389-91 (Colleen Moses), 394-95 (Crowson), 397-98 (Gwendolyn Smale), 402-03 (Ronnie Long), 406-09 (Linda Berk), 432-33 (Noad Vickery), 437-39 (Gene Hinson), 502-03 (Sheila White), 504-06 (Joan Weiner), 512-13 (Ronald Salsini), 517-19 (Marie Mazza), 523-24 (Chatta Nix), 530-31 (Mary Jane Witt), 535-36 (Leta Girard), 543-45 (Jean Williams), 554-56 (Charles Smith), 567-69 (Debra McDowell), 572-74 (Joyce Willard), 574-76 (Virginia Webb), 581-82 (Kevin Duke), 588-90 (Louis Wolters), 594-95 (Cheryl Davis), 599-601 (Gary Spence), 609-10 (Mildred Pincus), 611-12 (Carol King), 617-18 (Whaley), 620-21 (Catherine Barnard), 626-27 (Susan Page), 635-36 (Brenda Walsh), 644-45 (Russell Jones), 685-86 (Max O'Dell), 692-94 (Sandra Hearn).

[17] *See* JA 410-11 (Dominick Desinise), 537-40 (Clara Evans), 549-50 (Vivian Sztybel). Desinise and Evans had indicated their strong opposition to the death penalty in their juror questionnaires. Apart from these white jurors, the prosecutors employed their graphic description of the physical realities of an execution with white jurors only *after* they had already expressed some hesitation about the death penalty.

For example, prosecutor Macaluso questioned African American juror Carrol Boggess as follows:

> MR. MACALUSO: [W]e intend to provide this jury . . . with the type and the quality of evidence that would convince them . . . that [the sentencing] questions . . . should be answered yes. All yes answers, as you know, would result in the law requiring the Judge to sentence Thomas Joe Miller-El to be taken some day down to Huntsville, Texas and at an appointed time . . . *he be taken to the death house to have a needle placed into his arm and thereafter have a lethal substance injected into his body to cause his death as the law requires under those situations. I'm not trying to make this sound real gory or gruesome . . . but it wouldn't be fair to you to lull you into some sense that this is going to be some kind of a—any other type of case when we know it's not and what the stakes are ultimately*. . . . Do you see what I'm getting at?
>
> MS. BOGGESS: Yes.
>
> MR. MACALUSO: It's one thing to sit around and talk about what you might do in a situation, what you would like to do or what ought to be done . . . . I know that it is quite a different situation frequently when you're actually called upon to do something yourself. . . . Do you see what I'm getting at?
>
> MS. BOGGESS: Yes.
>
> MR. MACALUSO: [C]ould you share with us, Ms. Boggess . . . what your feeling are really about the death penalty and whether or not you can actually serve on this type of case?

JA 191-92 (emphasis added).[18] The prosecutors' standard approach to white jurors, however, omitted all mention of the mechanics of execution.[19]

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[18] The prosecution used the same basic script, for example, when questioning Wayman Kennedy, also African American (JA 214-15 (emphasis added)):

> MR. NELSON: [I]f those three [sentencing] questions are answered yes, at some point, Thomas Joe Miller-El will be taken to Huntsville, Texas. *He will be placed on death row and at some time will be taken to the death house where he will be strapped on a gurney, an IV put into his arm and he will be injected with a substance that will cause his death . . . as the result of the verdict in this case if those three questions are answered yes.*
>
> * * * *
>
> MR. NELSON: Would you just tell us in your own words, if you would, how you feel about the death penalty and whether it serves a purpose in our society today?

[19] White jurors Joan Weiner and Marie Mazza, for example, were questioned with the standard formulation for white jurors at almost the same time as Boggess and Kennedy. Macaluso questioned Weiner as follows (JA 505-06):

> MR. MACALUSO: [W]e are actively seeking the death penalty in this case for Thomas Joe Miller-El . . . . As you know, three yes answers [to the sentencing questions] equal a mandatory, automatic sentence of death for Thomas Joe Miller-El or anyone else so charged . . . Would you share with us . . . your personal feelings, if you could, in your own words how you do feel about the death penalty and capital punishment and secondly, do you feel you could serve on this type of jury and actually render a decision that would result in the death of the Defendant in this case based on the evidence?

He questioned Mazza as follows (JA 517-18):

> MR. MACALUSO: [W]e're actively seeking the death penalty in this case for Thomas Joe Miller-El . . . [W]e intend to be able to provide this jury with the type and quality of evidence . . . that would convince them that these [sentencing] questions . . . should be answered yes. As you know, the result of three yes answers or all yes answers is a mandatory sentence of death. Basically that's what we're seeking based on the evidence that we intend to offer during the course of this trial . . . . Let me just ask you, Marie, to share with us in your own words how you feel about the death penalty, you know, capital punishment generally speaking and then whether or not you feel you could actually serve on this type of a case or are suited to serve on this type of a case?

The prosecution also questioned whites and African Americans differently with respect to their willingness to impose the minimum penalty for murder—again with the obvious design to establish a basis to remove African American veniremembers. (Unwillingness to impose the minimum penalty warrants removal for cause, *see Huffman v. State*, 450 S.W.2d 858, 861 (Tex. Crim. App. 1970), *vacated in part*, 408 U.S. 936 (1972).) With forty-seven of forty-nine white jurors, the State identified the minimum statutory penalty early in its questioning, before it asked what they believed an appropriate minimum would be.[20] In contrast, if the State ever articulated the minimum sentence of five years when questioning African Americans, it did so only after attempting to induce them to commit themselves to a *higher* minimum sentence. The State used this manipulative style—to which defense counsel regularly objected[21]—with all but one of the African American jurors.[22]

The questioning of veniremember Kennedy is illustrative. The prosecution opened by explaining that, were the jury to find petitioner not guilty of felony murder, then

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[20] *See, e.g.*, JA 280-83 (Don Hambrick), 285-87 (Williams), 289-91 (Weigant), 362-64 (Taylor), 370-73 (Waggoner), 385-87 (Jenkins), 391-92 (Moses), 398-401 (Smale), 403-05 (Long), 433-35 (Vickery), 506-10 (Weiner), 514-16 (Salsini), 519-22 (Mazza), 524-27 (Nix), 532-34 (Mary Jane Witt), 545-48 (Williams), 550-53 (Szytbel), 556-59 (Smith), 569-72 (McDowell), 576-80 (Webb), 582-86 (Duke), 590-92 (Wolters), 596-98 (Davis), 602-08 (Spence), 612-16 (King), 621-25 (Barnard), 628-31 (Page), 636-39 (Walsh), 645-50 (Jones), 686-91 (O'Dell), 694-97 (Hearn). The two exceptions had already expressed opposition to the death penalty. *See* JA 355-59 (Gibson), 378-82 (Holtz).

[21] *See, e.g.*, JA 311-12, 451-53, 494-95, 227, 563.

[22] *See, e.g.*, JA 93-94 (Bozeman), 119-24 (Fields), 145-50 (Warren), 161-69 (Rand), 202-08 (Boggess), 225-30 (Kennedy), 562-69 (Baker).

the death penalty would not be available. In that circumstance, the prosecution continued, the question would be whether petitioner was guilty of simple murder. JA 225. The prosecution then explained at great length that murder is different from, and more serious than, killing in self-defense, manslaughter, and killing when mentally incompetent. JA 225-26. In particular, the prosecution stressed that the issue would be whether petitioner was guilty of a "knowing and intentional" killing. JA 226. Having thus stressed the seriousness of murder as contrasted with lesser forms of homicide, the prosecution then asked an open-ended question about sentencing (JA 226-27):

> MR. NELSON: Now the maximum sentence for [murder] ... is life under the law. Can you give me an idea of just your personal feelings what you feel a minimum sentence should be for the offense of [intentional] murder the way I've set it out for you?
>
> MR. KENNEDY: Well, to me that's almost like it's premeditated. But you said they don't have a premeditated statute here in Texas.
>
> * * * *
>
> MR. NELSON: Again, we're not talking about self-defense or accident or insanity or killing in the heat of passion or anything like that. We're talking about the knowing—
>
> MR. KENNEDY: I know you said the minimum. The minimum amount that I would say would be at least 20 years.
>
> MR. NELSON: For the taking of another human life?
>
> MR. KENNEDY: Yes.

Again, the State employed a starkly different approach with white veniremembers. Rather than asking open-ended questions about the minimum sentence the veniremember thought was appropriate, the prosecution almost invariably began by identifying the precise statutory minimum, and then seeking confirmation that the juror would support that

penalty if warranted. Early in the questioning of white juror Weiner, for example, the following exchange ensued:

> MR. MACALUSO: All the law says is this, and I think you can do this: All the law expects of a juror in a murder case, number one, is to keep an open mind, follow the law and just tell us you will wait and listen to all of the evidence .... You're not going to jump to any judgment or anything like that ....
>
> MS. WEINER: No.
>
> * * * *
>
> MR. MACALUSO: .... In other words—you see, the range of penalty for murder is from five years in the Texas Department of Corrections up to 99 years or life and you can even add on an option of a $10,000.00 fine. I gather from what you've said you are the type of person who has an open mind?
>
> MS. WEINER: Yes.
>
> * * * *
>
> MR. MACALUSO: If you hear a case, to your way of thinking calls for and warrants and justifies five years, you'll give it?
>
> MS. WEINER: Yes.

JA 508-09. By informing white jurors at the outset about the statutory minimum, the prosecution obviously minimized the likelihood that they would identify a sentence above that minimum as the lowest they could possibly impose.[23]

The State tried to capitalize on its disparate questioning by asking that nine of the fifteen African Americans

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[23] It is notable that, in *Chambers*, the Texas Court of Criminal Appeals found that Macaluso had—shortly before his questioning here—engaged in the same disparate questioning concerning minimum punishment. *See* 784 S.W.2d at 31. Macaluso's professed desire to protect the defendant from over-zealous pro-prosecution jurors who could not accept the statutory minimum penalty did not extend to white panelists at all. *Id.* As noted *supra* at 5, the court held that Macaluso's actions during jury selection in that case violated *Batson*. *Id.* at 32.

subjected to voir dire be struck for cause. Three African Americans were ultimately struck for cause, and one was removed by joint agreement of the parties after voir dire. *See supra* note 13.

c. *Peremptory Challenges Employed by Prosecutors To Strike Ten of Eleven African Americans.* As a result of the foregoing, eleven African Americans were qualified to serve on the jury. The prosecutors, however, used ten of the fourteen peremptory challenges they exercised to strike all but one—or 91%—of them. In contrast, the prosecutors used peremptory strikes on just four—or 13%—of the thirty-one non-African Americans similarly qualified for service.

The prosecution denied that it had used its peremptory strikes to remove African Americans, *see, e.g.*, JA 844-45, and pointed out that one African American veniremember, Troy Woods, was empanelled. The record suggests, however, that Woods' eventual selection was a function of numbers. At the time Woods was interviewed, only seven of the twelve seats on the jury had been filled, and the State had only four peremptory strikes remaining. The eight veniremembers following Woods included three African Americans. JL 93-95. The State could not be sure of removing them—and any strong pro-defense or anti-death-penalty white jurors—from the jury without saving a sufficient number of peremptories. Indeed, the State subsequently used three of its four peremptories to strike the remaining African Americans. JA 634, 643, 675.

In these circumstances, the State presumably accepted Woods because he was stridently supportive of the death penalty. JA 255-56; JL 93. When asked whether he could impose a death sentence, Woods replied: "[Lethal injection is] too quick. They don't feel the pain . . . [W]hat I call punishment is back to the old Indian days . . . . Pour some honey on them and stake them out over an antbed . . . . That's what I call punishment." JA 255. Even with this expression of strong pro-death-penalty sentiment, the prosecutors balked

before accepting Woods, asking the judge to allow them to deliberate for "a few minutes." JA 271-72.

d. *The State's Racially Disparate Application of Proffered Race-Neutral Rationales for Their Peremptory Strikes.* In response to defense counsel's objections, the prosecution proffered race-neutral rationales for its peremptory strikes. For six of the ten African Americans who were struck, those justifications consisted of one or more of three professed concerns: hesitancy or ambivalence about the death penalty; hesitancy about executing defendants who are capable of being rehabilitated; and a family history of criminality or trouble with the law. Yet each of these justifications applied equally to white jurors whom the prosecution did not seek to exclude from jury service.

i. *Ambivalence about the death penalty.* The State permitted white veniremembers who expressed hesitancy about the death penalty to be seated on the jury. For example, white juror Sandra Hearn explained that she did not think "anyone should be sentenced to a death penalty on [a] first offense." JA 694. Similarly, white juror Marie Mazza expressed considerable hesitancy about her ability to impose the death penalty: "It's difficult, I know—and I've had two days to think about it. Toying with my religious upbringing, my family upbringing and such, it depends upon how I feel that the testimony was presented to me and that would be something that I would feel like I could do. It's difficult." JA 519. Hearn and Mazza both served on the jury.[24]

ii. *Hesitation based upon potential rehabilitation.* White juror Hearn stated that her support for the death

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[24] White veniremember Robert Salsini expressed only qualified support for the death penalty: "I think I could make the decision, you know, come up with it, but I think it would be more of I would be forced into that position. I wouldn't be happy with it, but I could do it. I don't think I would be pleased with it. Even if there was no doubt or anything, I think I might have a problem with it in the future." JA 514. After the prosecution offered no objection, the defense struck juror Salsini.

penalty depended on whether the defendant could be rehabilitated. JA 694 ("I believe in the death penalty if a criminal cannot be rehabilitated and continues to commit the same type of crime. I do not think anyone should be sentenced to a death penalty on [a] first offense."). White juror Kevin Duke also expressed strong pro-defendant views about rehabilitation. When asked his opinion about a law that would permit a defendant convicted of murder to be eligible for parole in just two years, Duke responded: "I think it's a good one. If they've changed within those two years and they can be a responsible human being and live in society, I see nothing wrong with it. . . . I believe in forgiving." JA 587. Jurors Hearn and Duke both served on the jury.

iii. *Family history of criminality.* The State accepted numerous white jurors whose family members had substantial criminal backgrounds. Noad Vickery testified that his sister had been incarcerated in the state penitentiary. JA 435-36. Cheryl Davis stated that her husband had been convicted of theft. JA 598-99. Chatta Nix revealed not only that her brother was then on trial as part of a construction scandal, but also that she herself had been "charged with a conspiracy case" related to that scandal. JA 528. Joan Weiner indicated that her son had been arrested for shoplifting. JA 511. Despite these histories, the State did not strike Vickery, Davis, Nix or Weiner.[25]

The State's acceptance of these white jurors severely compromises its proffered race-neutral rationales for striking the following six African American jurors:

Edwin Rand. The State asserted that it struck veniremember Rand because of his ambivalence about the death penalty. JA 186-87. But Rand expressed no greater hesitancy than white jurors Hearn and Mazza. Rand clearly supported the death penalty on his juror questionnaire,

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25 Weiner served on petitioner's jury. The defense used peremptory strikes to remove the other three, after the State declined to strike them.

writing that he supported the death penalty "depending on [the] crime," and that he thought it was "possibly" appropriate for "all murder." JL 36. During voir dire, he confirmed that he thought the death penalty "could be enforced depending upon the crime itself, the circumstances of why someone was killed or could it have been avoided, that type of situation." JA 158; *see also* JA 159 (explaining view that death penalty should be considered for murder committed in the course of a robbery "because of the murder knowingly. It wasn't a case of, say, self-defense or an accidental type thing."). And although Rand expressed some initial uncertainty about his ability to impose the death penalty, he subsequently confirmed that he could serve on a capital jury. JA 162-64. Indeed, the State itself confirmed Rand's readiness to serve on the jury in this case, noting the following on his juror questionnaire: "Could be enforced depending upon circums . . . Murd./Robb.—Type of offense think proper for DP . . . 'Yes'—I can serve." JL 36.

Wayman Kennedy. As with Rand, the State asserted that it struck Kennedy because of hesitancy about the death penalty. JA 248-49. But, in contrast to white jurors Hearn and Mazza, Kennedy did not express hesitancy about imposing the death penalty in murder-robbery cases like this one. Rather, Kennedy explained that, "if the circumstances around the situation were presented the way that I feel would warrant the death sentence, I would say yeah, but it also depends on the circumstances." JA 222-23. When asked whether he could give "a yes answer to each of those three [sentencing] questions knowing it would result in the death sentence even though [his] personal feelings were that the man should get a life sentence," Kennedy said that "[i]t would depend on the evidence," JA 223, and that he could answer all the questions affirmatively if he were satisfied that the prosecution had proved its case, JA 224.

Roderick Bozeman. In striking Bozeman, the State maintained that it was concerned about his hesitation about the death penalty and his views on rehabilitation. JA 102-03.

The record, however, shows that Bozeman supported the death penalty. In his juror questionnaire, he indicated that he supported imposing the death penalty where "the nature of the crime and the circumstances leading up to the crime" warranted it. JL 12. After the prosecution listed the crimes punishable by death in Texas, including murder during a robbery, Bozeman agreed that those were offenses that should make a defendant eligible for the death penalty. JA 83-84. Bozeman was at least as strong a supporter of capital punishment as were jurors Hearn and Mazza.

Nor did Bozeman limit the universe of cases in which the death penalty would be appropriate to ones in which rehabilitation was impossible. Like Hearn, Bozeman stated that he favored the death penalty in cases where there was no way to rehabilitate a person. JA 79. And he confirmed that his feelings about rehabilitation would not in any way conflict with his ability to answer the specific questions put to the jury at sentencing. JA 89.

Billy Jean Fields. The prosecutors claimed that they struck Fields because of his views on rehabilitation, concern that Fields' Roman Catholic faith would interfere with his application of the death penalty, and concern that Fields' brother had a criminal record. JA 131-33. But Fields indicated on his questionnaire that he believed in the death penalty and wrote that "[i]f you commit the crime pay the [penalty]." JL 20; *see also* JA 108-09 (indicating Fields saw death penalty as a deterrent to crime). Fields did say he believed that everyone could be rehabilitated. But in contrast to white juror Hearn, he made clear that he supported the death penalty nevertheless. JA 118-19. Indeed, the State acknowledged the strength of Fields' views by noting on his questionnaire that he had "no reservations" against the death penalty. JL 20.

The State's professed concern that Fields would not be able to impose the death penalty because of the dictates of his Catholic faith is also refuted by the record. Fields testified that he did not agree with the Church's opposition to the

death penalty, and confirmed that he had no philosophical or religious reservations about it. JA 107-08. Moreover, the State accepted at least three non-African American Catholics for service on petitioner's jury. Mary Sumrow, a white Catholic, was initially seated as the first juror in the case but later had to be excused due to medical hardship. *See* JA 323. Filemon Zablan, an Asian Catholic, was seated as the tenth juror. JA 671-72. Max O'Dell, a white Catholic, was accepted by the State but struck by the defense. JA 691.

Finally, the State failed even to raise the issue of Fields' brother's criminal record during its examination, and, as noted, it did not exercise peremptory strikes against any of the four white jurors with similar family circumstances.

Joe Warren. The State claimed it struck veniremember Joe Warren based on hesitancy about the death penalty and family members' negative experiences with the law. JA 856-59. But as with the other African Americans at issue here, the record shows that Warren expressed clear support for the death penalty. In his juror questionnaire, Warren wrote that he believed in the death penalty "[i]n some cases." JL 28; *see also* JA 137 (testifying to view that death penalty might not be appropriate in cases of self-defense). Warren did state that he sometimes felt that if the death penalty is imposed, the condemned person would not really suffer. JA 140. But the State accepted white juror Sandra Jenkins, who expressed similar views. JA 384 (explaining that "life imprisonment with no parole" was "a harsher treatment" than the death penalty). Overall, Warren's support for the death penalty was at least as strong as that of Hearn and Mazza.

Despite the prosecution's subsequently professed concern about Warren's brother's and son's experiences with the law, it never raised them during voir dire. Indeed, the issue arose in voir dire only during questioning by defense counsel, when Warren confirmed that his son's difficulties at school would have no impact on his deliberations in the case. JA 153. Moreover, Warren is not distinguished on this basis

from Vickery, Davis, Nix, or Weiner—all white jurors accepted by the prosecution for service on petitioner's jury.

Carroll Boggess. As with Warren, the State claimed it struck Boggess because of misgivings about the death penalty and a family member with a criminal record. JA 211. Like the other African Americans at issue here, however, Boggess expressed both support for the death penalty and confidence in her ability to impose it. JA 192, 204-05. Certainly, Boggess expressed no greater concern about the death penalty than white jurors such as Hearn and Mazza. Similarly, the State's contention that it was concerned that Boggess had served as a defense witness in a trial involving her nephew, JA 211, is belied both by its failure to mention this during her voir dire and the numerous white jurors with far greater family—or even personal—connections to criminal proceedings whom the State did not strike.

5. The trial court rejected petitioner's *Batson* claim. Its opinion focused solely on the State's actions during voir dire in this case, omitting any mention of the pattern and practice evidence introduced by petitioner. Despite the Court of Criminal Appeals' prior conclusion to the contrary, *see* JA 833-35, the trial court "remain[ed] convinced that . . . the evidence did not even raise an inference of racial motivation in the use of the State's peremptory challenges," JA 876. Deeming the State's explanations "completely credible," the court found "no purposeful discrimination by the prosecutor in the use of his peremptory strikes." JA 878.

In September 1992, the Court of Criminal Appeals affirmed petitioner's conviction and sentence of death. JA 880-97. The court reiterated its earlier statement that "a sufficiently disproportionate number of black veniremembers were removed by peremptory challenge of the State as to make a *prima facie* case of racial discrimination in the jury process." JA 881. The appeals court agreed with the trial court, however, that the State had provided "a racially neutral explanation reasonably related to the trial of this case." *Id.* The court did not examine, however, whether the totality of

the evidence—including the evidence introduced at the *Batson* hearing and the pattern and practice evidence introduced at the initial pre-trial hearing—supported a conclusion of purposeful discrimination by the State. Indeed, the court failed to address any of the pattern and practice evidence. Looking only at the evidence relating directly to the trial court proceedings, the court asked whether the State's explanations were "patently implausible or so contrary to the evidence as to be unworthy of belief as a matter of law." *Id.* The court concluded that petitioner had not satisfied this standard.

Federal Court Proceedings

1. Petitioner sought a writ of habeas corpus in federal district court. JA 898. The federal magistrate observed that petitioner had amassed a "considerable amount of evidence showing that the Dallas County District Attorney's office had an unofficial policy of excluding African-Americans from jury service in years past," and concluded that only a pattern and practice of discrimination in jury selection could explain "the appalling statistics brought to light by the *Dallas Morning News* in March 1986." JA 919. The magistrate considered evidence of such "historical" discrimination, however, to be "of limited value in assessing whether the race-neutral explanations articulated by the prosecutor were a pretext for discrimination *in this case*." JA 911 (emphasis in original). According to the magistrate, such evidence is "only relevant in determining whether petitioner has established a prima facie case under *Batson*" and does not bear on the ultimate question whether purposeful discrimination had occurred. JA 910-11.

Setting the pattern and practice evidence aside, the magistrate concluded that petitioner had not established as "unreasonable," 28 U.S.C. § 2254(d)(2), the state trial court's finding that "'the primary reasons for the exercise of the challenges against each of the veniremen in question, their reluctance to assess or reservations concerning the imposition of the death penalty, were closely related to the facts of the

case' and negated any inference of discrimination." JA 919-20. The magistrate therefore recommended that the petition be denied. JA 920.

The district court accepted the magistrate's recommendations and denied the petition. JA 942. The court subsequently denied petitioner's request for a certificate of appealability ("COA"). JA 948.

2. Petitioner then sought a COA from the United States Court of Appeals for the Fifth Circuit, which denied the request. *Id.* Quoting 28 U.S.C. § 2253(c)(2), the court noted that a COA should issue if "the applicant has made a substantial showing of the denial of a constitutional right." JA 955-56. The court also concluded, however, that in order to make that showing, petitioner was required to show, by "clear and convincing evidence," that the decisions of the state courts in this case were "unreasonable" under 28 U.S.C. § 2254(d). JA 958-59. The court rejected petitioner's argument that the state courts misapplied *Batson* by "fail[ing] to give proper weight and credit to the evidence . . . regarding the historical data evidencing exclusion of African-American jurors." JA 959-60. The court did not, however, discuss that evidence. Observing that state court findings are "entitled to great deference," JA 960, the court declared that "[t]he detailed factual findings made by the state trial court establish that each of the challenged African-American jurors was stricken on race-neutral grounds," *id.* Accordingly, the court held that the state court's findings were not "unreasonable," and that petitioner had failed to "present clear and convincing evidence to the contrary." *Id.* Having thus determined that it would reject petitioner's *Batson* claim on the merits, the court then held, without further analysis, that "this issue would not be debatable among jurists of reason" and thus that a COA should not issue. JA 960-61.

SUMMARY OF ARGUMENT

On the record of this case, petitioner has established not only entitlement to a COA, but also that the state courts'

denial of his *Batson* claim was "based on an unreasonable determination of the facts" in light of the evidence before them. 28 U.S.C. § 2254(d)(2).

I. The court of appeals applied the wrong legal standards to petitioner's request for a COA on his claim for federal habeas relief on *Batson* grounds. First, its decision to deny the COA appears to rest on nothing more than its own determination that petitioner was not ultimately entitled to relief. As this Court has explained, however, a habeas petitioner is entitled to a COA under 28 U.S.C. § 2253(c) if he shows that "reasonable jurists could debate" whether his petition contains merit, or that the petition "'deserves encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)). The petitioner need not persuade the reviewing court that his claim is ultimately meritorious. By denying petitioner a COA on that basis, the court of appeals converted the COA process into the appeal itself, in clear violation of the text and purpose of section 2253(c).

Second, in evaluating the merits of petitioner's claim, the court of appeals erroneously compounded the requirement of section 2254(d)(2) with that of section 2254(e)(1). The former authorizes federal courts to grant habeas relief where the state court decision at issue was "based on an unreasonable determination of the facts" in light of the evidence before the state court. 28 U.S.C. § 2254(d)(2). The latter provides that a state court's factual findings shall be presumed correct in federal habeas proceedings, unless shown to be incorrect by "clear and convincing evidence." *Id.* § 2254(e)(1). The court of appeals' holding that habeas petitioners can prevail under section 2254(d)(2) only by adducing "clear and convincing evidence" that the state court's decision was based on "unreasonable" factual findings ignores the critical distinction between section 2254(d)(2)'s reference to *unreasonableness* and section 2254(e)(1)'s reference to *correctness*, a distinction whose significance this Court has

stressed. *See Williams v. Taylor*, 529 U.S. 362, 411 (2000). Moreover, it confuses the separate, though complementary, functions played by the two provisions. Section 2254(e)(1) establishes the quantum of evidence needed to rebut the presumed correctness of any individual factual finding made by a state court, while section 2254(d)(2) conditions federal habeas relief on a showing that the state court decision at issue was "*based on* an unreasonable determination of the facts." While each standard must be satisfied on its own terms, Congress plainly did not intend section 2254(e)(1) to heighten the requirements of section 2254(d)(2) in the fashion prescribed by the court of appeals.

II. The record in this case compels the conclusion that the state courts' denial of petitioner's *Batson* claim was "based on an unreasonable determination of the facts" in light of the evidence before them. The prosecution used ten of its fourteen peremptory strikes to remove 91% of the qualified African American veniremembers from petitioner's case, while striking only 13% of the qualified non-African Americans. In the face of this gross disparity, the prosecution offered with respect to six of its strikes of African Americans only patently pretextual explanations that applied equally to white veniremembers the prosecution did not strike. Those explanations are "simply too incredible" to be believed, *Hernandez v. New York*, 500 U.S. 352, 369 (1991) (plurality), when evaluated in light of (1) the longstanding and ongoing policy in the Dallas County DA's office to exclude African Americans from jury service, (2) overwhelming statistical evidence demonstrating an "appalling" pattern of such exclusions in serious criminal matters during the period at issue, and (3) additional evidence in this case that the prosecution attempted to exclude African Americans at each stage of the jury selection process. On this record, it is clear that the prosecution's peremptory strikes were impermissibly based on jurors' race. The state courts' contrary conclusion was based on a manifestly unreasonable assessment of the record.

Indeed, the evidence in this case is so overwhelming that only by granting the petitioner's claim for relief can this Court give full effect to its decision in *Batson*. It would not be enough to declare that petitioner's claim is "arguable" and that he is thus entitled to a COA. The record contains in abundance every kind of evidence of purposeful discrimination a petitioner could adduce. If state courts can reject *Batson* claims in the face of such evidence, then *Batson* risks becoming a dead letter. The Court should issue the writ to confirm that *Batson* continues to protect against unconstitutional race discrimination in jury selection.

ARGUMENT

I. THE COURT BELOW APPLIED INCORRECT STANDARDS TO PETITIONER'S APPLICATION FOR A CERTIFICATE OF APPEALABILITY AND TO THE MERITS OF HIS CLAIM.

Section 2253(c)(1) of Title 28, United States Code, provides that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court." Section 2253(c)(2) further provides that a COA "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." In denying petitioner's request for a COA on his *Batson* claim, the court of appeals misconstrued both the standard for a COA and the underlying standard governing petitioner's entitlement to federal habeas relief.

A. The Court Erred in Basing Its COA Analysis on Whether Petitioner Had Established Ultimate Entitlement to Relief.

As this Court has explained, a state prisoner whose habeas petition has been denied by a federal district court meets the standard for a COA if he shows that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner

or that the issues presented [are] 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)). That is, a COA must issue where the petitioner "demonstrate[s] that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* Here, in denying petitioner a COA on his *Batson* claim, the court below focused not on whether "reasonable jurists could debate whether" the district court should have found for petitioner, but on its own conclusion that petitioner's claim lacked merit. That was error.

Petitioner's *Batson* claim asserts entitlement to federal habeas relief principally under 28 U.S.C. § 2254(d)(2). In particular, petitioner contends that the state trial court's rejection of his *Batson* claim "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* In denying petitioner's request for a COA on this claim, the court of appeals focused on its ultimate merits:

> We have now conducted an independent review of the findings of the state court and of the evidence presented by [petitioner] in his application. Suffice it to say, and without commenting on each of the challenged jurors and the reasons proffered for their being excluded, we find that the state court's findings are not unreasonable and that [petitioner] has failed to present clear and convincing evidence to the contrary.

JA 960. Having made those findings, the court rejected petitioner's claim on the merits, concluding that "the state court's adjudication [of petitioner's *Batson* claim] neither resulted in a decision that was unreasonable in light of the evidence presented nor resulted in a decision contrary to clearly established federal law as determined by the Supreme Court." JA 960-61. Only after reaching that ultimate conclusion did the court declare—in less than one sentence and without any additional analysis—that a COA was not warranted. *Id.* The court did not explain why its own

determination that petitioner's claim lacked merit compelled the conclusion that no "reasonable jurist" could find otherwise. *Slack*, 529 U.S. at 484.

The court of appeals clearly erred in basing its denial of a COA on its own finding, without more, that the underlying claim lacked merit. The plain language of the statute, which is necessarily the starting point of the analysis, *see Williams v. Taylor*, 529 U.S. 420, 431 (2000), makes clear that entitlement to a COA turns not on whether a petitioner can establish ultimate entitlement to relief prior to appeal, but on whether he can make a "*substantial showing* of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2) (emphasis added), so as to warrant permitting him to appeal. This Court has described the analysis as a "threshold inquiry," *Slack*, 529 U.S. at 482, not a full review of the merits:

> In requiring a . . . substantial showing of the denial of [a constitutional] right, obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [differently]; or that the questions are adequate to deserve encouragement to proceed further.

Barefoot, 463 U.S. at 893 n.4 (internal quotations omitted, emphasis in original).[26] Indeed, the clear language of the statute establishes that a petitioner's entitlement to pursue an appeal is not conditioned on persuading the appellate court, in advance, that the appeal must ultimately prevail, but rather

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[26] *Barefoot* addressed the standards for a certificate of probable cause ("CPC"), which was replaced in 1996 by the COA. This Court has made clear, however, that "[e]xcept for substituting the word 'constitutional' for the word 'federal,' section 2253 is a codification of the CPC standard announced in *Barefoot v. Estelle*." *Slack*, 529 U.S. at 483. Accordingly, the Court has relied upon *Barefoot* when construing and applying the standard for a COA. *See id.* at 483-84.

on making a "substantial showing" of merit in the underlying constitutional claim. 28 U.S.C. § 2253(c)(2).[27]

By the same token, one court's determination that a habeas petitioner's underlying claim lacks merit is insufficient, without more, to establish that a COA should not issue. Instead, entitlement to a COA turns simply on whether the petitioner's claim is sufficiently plausible that it "'deserve[s] encouragement to proceed further.'" *Slack*, 529 U.S. at 484 (quoting *Barefoot*, 463 U.S. at 893). Were that not the case, only those habeas petitioners who ultimately prevail on appeal would be allowed to pursue an appeal in the first place, and the COA process would be converted, paradoxically, into the appeal itself.[28] That is precisely what the court of appeals did here: It first rejected petitioner's claim on the merits and then summarily concluded, on that basis and without any additional analysis, that petitioner had not made the requisite "substantial showing" for a COA. That approach cannot be reconciled with the text or purpose of the statute.[29]

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[27] The Court has also stressed that where, as here, the petitioner has been sentenced to death, "the nature of the penalty is properly considered in determining whether to issue a [COA]." *Barefoot*, 463 U.S. at 893. The court of appeals displayed no such consideration in this case.

[28] Indeed, if mere rejection of the claim by a single federal court were sufficient, no COA would ever issue because every request for a COA is necessarily preceded by a federal court's rejection of the claims in the underlying petition. *See Barefoot*, 463 U.S. at 893 n.4. This point is most plain where, as permitted under Fed. R. App. P. 22(b)(1), the petitioner seeks a COA from the very court that has denied his petition.

[29] Alternatively, the plain meaning of the statutory text suggests that the court of appeals erred in including *any* of the standards found in section 2254(d) in its assessment of whether petitioner had satisfied the requirements for a COA under section 2253(c). The standard for a COA requires that the petitioner make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Read according to its terms, that standard is concerned not with whether the petitioner establishes that the state court decision at issue was "unreasonable" as required for relief to issue under section 2254(d), but simply with whether the petitioner makes a substantial showing that he was denied a constitutional right—i.e., that the state court's ruling on the underlying constitutional claim was incorrect. Under this alternative but plain reading of the statute's terms, in cases where the petitioner can make that showing he is entitled to appellate review of his claim, at which point he must satisfy the standards set forth in section 2254(d).

On this alternative reading, the court of appeals should have asked only whether petitioner made a substantial showing that his jury had been selected on the basis of race, not whether the state trial court acted unreasonably in concluding to the contrary. A number of courts of appeals have taken this approach. *See, e.g.*, *Cooey v. Coyle*, 2002 WL 552854 (6th Cir. Apr. 16, 2002); *Coady v. Vaughn*, 251 F.3d 480 (3d Cir. 2001); *Shayesteh v. City of South Salt Lake*, 217 F.3d 1281 (10th Cir. 2000). *But see, e.g.*, *McWee v. Weldon*, 283 F.3d 179 (4th Cir. 2002).

B. The Court Erred in Inserting Section 2254(e) into the Requirements of Section 2254(d).

Not only did the court of appeals erroneously base its COA analysis on a premature assessment of the underlying merits of petitioner's claim, but the court also applied the wrong standard for relief under section 2254(d)(2). The court stated that standard as follows: "[W]e are required by § 2254(d)(2) to presume the state court findings correct unless we determine that the findings result in a decision which is unreasonable in light of the evidence presented. *And the unreasonableness, if any, must be established by clear and convincing evidence. See* 28 U.S.C. § 2254(e)(1)." JA 960 (emphasis added). That is, the court held that not only must a habeas petitioner seeking relief under section 2254(d)(2) establish that the state court decision at issue was based on an "unreasonable" determination of the facts in light of the evidence presented: according to the court, he must also prove the "unreasonableness" of that determination by "clear and convincing evidence." The court then concluded that petitioner had failed to establish unreasonableness by this heightened standard. JA 961.

This extreme formulation is based on a misreading of the statute. In addition to section 2254(d), which establishes alternative requirements that must be met before federal

habeas relief may be granted, the habeas statute contains a separate provision, section 2254(e)(1), which provides that "a determination of a factual issue made by a State court shall be presumed correct," and that a federal habeas petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." Although sections 2254(d)(2) and (e)(1) are related to the extent that they both refer to a state court's factual findings, nothing in their text or purpose supports the court of appeals' application of section 2254(e)(1)'s "clear and convincing" evidentiary standard to the requirement of "unreasonableness" set forth in section 2254(d)(2). Indeed, the error in that approach is clear from the statute's plain text. As noted, section 2254(e)(1) provides that state courts' factual findings "shall be presumed *correct*," and establishes the showing needed to rebut this "presumption of *correctness*." Because the presumption to be rebutted is one of correctness, plainly the requirement of "clear and convincing evidence" refers to evidence that the finding in question is *incorrect*. Yet in grafting section 2254(e)(1) onto section 2254(d)(2), the court of appeals divorced the "clear and convincing" evidentiary requirement from the presumption of correctness it is tailored to rebut, and treated it as requiring "clear and convincing" evidence of *unreasonableness*. That requirement misconstrues section 2254(e)(1).

Moreover, the court of appeals' approach ignores the fact that, as this Court has explained, Congress made a specific choice in section 2254(d) to "use[] the word 'unreasonable,' and not a term like 'erroneous' or 'incorrect.'" *Williams v. Taylor*, 529 U.S. 362, 411 (2000). The word choice is a significant one, for a finding is not necessarily unreasonable just because it is incorrect. *See id.* To insist that section 2254(d)(2)'s requirement of *unreasonableness* be established by means of a "clear and convincing" evidentiary standard contained in a separate provision focusing on *correctness* would be to ignore entirely

Congress's specific choice about how, and where, to employ those different terms in the statute.

Rather, sections 2254(d)(2) and (e)(1) are properly understood to articulate independent rules. Section 2254(e)(1) establishes the general rule in federal habeas proceedings that the factual findings of state courts shall be presumed correct, and it specifies that in order to rebut this presumption the petitioner must show the particular factual finding at issue to be incorrect by clear and convincing evidence. That is, section 2254(e)(1) instructs federal habeas courts how to treat individual findings of fact by state courts, without regard to the relationship between the particular factual finding at issue and the decision being challenged. Section 2254(d)(2), however, focuses on that precise relationship, and conditions federal habeas relief on a showing that the state court decision at issue was "*based on* an unreasonable determination of the facts." (emphasis added). The two sections are thus distinct, though complementary: Section 2254(e)(1) establishes that only those findings shown to be incorrect by clear and convincing evidence may be deemed incorrect in federal habeas proceedings, while section 2254(d)(2) provides that habeas relief may not issue for a factfinding error unless the state court's decision is *based on* an unreasonable determination of fact. *See Valdez v. Cockrell*, 274 F.3d 941, 951 n.17 (5th Cir. 2001); *Sanna v. DiPaolo*, 265 F.3d 1, 10 (1st Cir. 2001); *Torres v. Prunty*, 223 F.3d 1103, 1110 n.6 (9th Cir. 2000).[30]

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[30] Where a state court's decision depends upon factfinding that is incorrect by clear and convincing evidence that was presented to that court, the requirements of both section 2254(e)(1) and 2254(d)(2) are necessarily satisfied. Not only is the predicate fact shown to be incorrect by clear and convincing evidence, but the factfinding on which the decision is *based* is therefore unreasonable. As demonstrated below, that is the situation in this case. The factual determination on which the state courts' decision depended was their conclusion that the prosecutors did not exercise their peremptory challenges to exclude African Americans based upon their race. Because this determination was incorrect by clear

Here, the court of appeals improperly compounded the standard of proof with respect to correctness set forth in section 2254(e)(1) with the unreasonableness standard of section 2254(d)(2), thus concocting an inappropriate barrier to relief under the statute.

II. A WRIT OF HABEAS CORPUS SHOULD ISSUE BECAUSE THE STATE COURTS' RESOLUTION OF PETITIONER'S *BATSON* CLAIM WAS "UNREASONABLE" WITHIN THE MEANING OF SECTION 2254(d).

The evidence in this case far exceeds the requisite standard for relief under section 2254(d)(2)—that the state courts' denial of his *Batson* claim be based on an unreasonable determination of the facts before it. Indeed, the record establishes that it would be unreasonable to conclude that the rule of *Batson* was *not* violated during the selection of petitioner's jury.

A. *Batson* Claims Must Be Evaluated in Light of All Relevant Evidence.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court affirmed in part and overruled in part its earlier decision in *Swain v. Alabama*, 380 U.S. 202 (1965), regarding the application of the Fourteenth Amendment's Equal Protection Clause to claims of race-based discrimination in criminal jury selection. In so doing, *Batson* reaffirmed that the Equal Protection Clause protects a criminal defendant's "right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." 476 U.S. at 85-86. More specifically, *Batson* confirmed that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that

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and convincing evidence before the state courts, both section 2254(e)(1) and section 2254(d)(2) are satisfied here.

black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at 89.[31]

The *Batson* Court then outlined a three-step process for evaluating claims that the State violated the Equal Protection Clause by exercising peremptory challenges on the basis of race. First, the defendant must make a prima facie showing of purposeful race discrimination in the prosecution's exercise of its peremptory challenges. *Id.* at 96-97. As was the case under *Swain*, the defendant may make this showing by introducing evidence that the prosecution's conduct in the instant case was part of a historical, multi-case pattern of race-based discrimination in jury selection. *Id.* at 93-95. *Batson*'s departure from *Swain* is that while this sort of "pattern and practice" evidence can be sufficient to establish a prima facie case, it is no longer necessary. Rather, *Batson* also permits the defendant to establish a prima facie case by relying solely on evidence regarding the exercise of peremptory challenges at his own trial. *Id.* at 96. Second, if the defendant has made a prima facie showing by either (or both) of these methods, the burden then shifts to the State to provide a race-neutral explanation for striking the jurors in question. *Id.* at 97-98. Third, and critically, the trial court must finally determine whether, despite the State's purportedly race-neutral explanation, the defendant has nevertheless established "purposeful discrimination." *Id.* at 98. If so, then the defendant has established that the State's exercise of its peremptory challenges violated the Constitution.

In making the final assessment of "purposeful discrimination," the trial court may find that the evidence supporting the defendant's prima facie case is so strong that the prosecution's purportedly race-neutral explanations for its

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[31] As the *Batson* Court observed, "[t]his principle ha[d] been 'consistently and repeatedly' reaffirmed, . . . in numerous decisions of this Court both preceding and following *Swain*." 476 U.S. at 84 (quoting *Swain*, 380 U.S. at 204); *see also id.* at 84 n.3 (collecting cases).

actions are "simply too incredible" to be believed. *Hernandez v. New York*, 500 U.S. 352, 369 (1991) (plurality); *see id.* at 375 (O'Connor, J., concurring in the judgment) ("Disproportionate [strikes of African-American jurors] may, of course, constitute evidence of intentional discrimination. The trial court may, because of such effect, disbelieve the prosecutor and find that the asserted justification is merely a pretext for intentional race-based discrimination."). In any event, the ultimate finding of purposeful discrimination must take into account *all* relevant evidence, including the evidence relied upon by the defendant to establish his prima facie case. *See Batson*, 476 U.S. at 93 (noting that a court determining the existence of "purposeful discrimination" must "undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'") (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).[32] On this point, the *Batson* analysis is consistent with this Court's approach to claims of unlawful discrimination in other contexts. *See Hernandez*, 500 U.S. at 365 (likening *Batson* analysis to Title VII analysis). In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), for example, the Court explained that in the Title VII context, "[a]lthough the presumption of discrimination [created by the prima facie case] drops out of the picture once the defendant meets its burden . . . , the trier of fact may still consider the evidence establishing the plaintiff's prima facie case and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual." *Id.* at 143 (internal quotations omitted). Thus, only if the purportedly race-neutral explanations for the conduct in question outweigh the

32 Numerous lower courts have so held. *See, e.g., Riley v. Taylor*, 277 F.3d 261, 286 (3d Cir. 2001) (en banc); *McClain v. Prunty*, 217 F.3d 1209, 1220-21 (9th Cir. 2000); *Jordan v. Lefevre*, 206 F.3d 196, 200 (2d Cir. 2000); *Coulter v. Gilmore*, 155 F.3d 912, 921 (7th Cir. 1998); *United States v. Hill*, 146 F.3d 337, 342 (6th Cir. 1998).

totality of evidence supporting a finding of discrimination can a court reject a claim of purposeful discrimination. *Id.*

B. The State Court's Resolution of Petitioner's *Batson* Claim Was Based on an Unreasonable Determination of the Facts in Light of the Evidence Presented.

The issue in this case focuses on the third step of the *Batson* analysis. The first two requirements of *Batson* are clearly met here: the extreme racial disparity in the State's use of its peremptory strikes suffices by itself to establish a prima facie case, as the Texas Court of Criminal Appeals correctly concluded (*see* JA 833, 880),[33] and the State satisfied *Batson*'s second step by offering facially neutral explanations for those peremptory strikes, without regard to the truth or persuasiveness of those explanations, *see Purkett v. Elem*, 514 U.S. 765, 767-68 (1995) (per curiam). The result here thus turns on step three of the *Batson* analysis, and on whether, as required by section 2254(d)(2) of the habeas statute, the state trial and appellate courts' finding of no "purposeful discrimination" was based on an

33 *See also, e.g., Fernandez v. Roe*, 286 F.3d 1073, 1078 (9th Cir. 2002) (finding prima facie case where Hispanics comprised 12% of venire and 21% of challenges made were against Hispanics); *Mahaffey v. Page*, 162 F.3d 481, 484-85 (7th Cir. 1999) (finding prima facie case where State used seven of thirteen strikes against African American veniremembers); *Jones v. Ryan*, 987 F.2d 960, 971 (3d Cir. 1993) (finding prima facie case where rate of minority exclusion was 75%, four times percentage of minorities on venire); *United States v. Alvarado*, 923 F.2d 253, 256 (2d Cir. 1991) (finding prima facie case where challenge rate for minorities was "twice the likely minority percentage of the venire"); *see also State v. Martinez*, 42 P.3d 851, 858-59 (N.M. 2002) (listing cases holding that, "as a matter of law, a disproportionate number of strikes against a particular group creates a prima facie case of discrimination"). Moreover, the pattern and practice evidence submitted by petitioner in this case (discussed *supra* at 6-8 and *infra* at 45-47) also establishes a prima facie case of discrimination under *Batson*. *See United States v. Hughes*, 864 F.2d 78, 80 (8th Cir. 1988) (holding that, under *Batson*, history of exclusion is a relevant factor in deciding whether the defendant has established a prima facie case).

"unreasonable determination of the facts in light of the evidence" that was before the state trial court.

Clear and convincing evidence in the state court record compels the conclusion that the State engaged in purposeful race-based discrimination during jury selection in petitioner's case. The state trial and appellate courts, however, did not take proper account of that overwhelming evidence.

First, the state courts did not give adequate consideration to the extreme racial disparity in the prosecution's exercise of its peremptory strikes or to the weakness of the State's proffered explanations for the strikes. Every African American veniremember removed by a peremptory challenge was removed by the prosecution. Indeed, the prosecution used its peremptory strikes to remove ten of eleven, or 91%, of the qualified African American veniremembers, in contrast to only four of thirty-one, or 13%, of the similarly situated non-African American members of the venire. *See supra* at 6, 20. Thus, African Americans were seven times more likely than non-African Americans to be peremptorily removed by the prosecution. Looked at another way, the prosecution used ten out of fourteen, or 71%, of its peremptories on African Americans, even though African Americans comprised only 26% of the veniremembers not removed for cause or by agreement. Thus, the prosecution exercised almost three times more peremptories on African American veniremembers than one would have expected had race not played a role in their exercise.

The state courts essentially concluded that this was all a coincidence. But the extent of the statistical disparitities themselves powerfully suggests that "chance or accident could hardly have accounted for" them. *Hill*, 316 U.S. at 404. Indeed, the fact that African Americans were *seven times* more likely than non-African Americans to be peremptorily struck by the prosecution is the kind of "proof of discriminatory impact" that "for all practical purposes demonstrate[s] unconstitutionality" because it is so "difficult to explain on nonracial grounds." *Batson*, 476 U.S. at 93

(internal quotations omitted); *see Hernandez*, 500 U.S. at 375 (O'Connor, J., concurring in the judgment) (noting that "[d]isproportionate [strikes] may, of course, constitute evidence of intentional discrimination."). If such a disparity *is* to be successfully defended at step three of the *Batson* analysis, however, the State's proffered explanation must be sufficiently "persuasive[]" to survive all the evidence tending to demonstrate that it engaged in purposeful discrimination when exercising its peremptories. *Purkett*, 514 U.S. at 768.

As this Court has explained, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Id.* That is the appropriate conclusion here, where *none* of the State's purportedly race-neutral explanations provides a credible basis for distinguishing between African Americans struck by the State and non-African Americans not struck by the State. Although petitioner makes out a complete *Batson* claim if he can show that *any one* veniremember was excluded from the jury because of purposeful discrimination, *see Batson*, 476 U.S. at 95, here the State's proffered race-neutral reasons for its strikes are inadequate to justify any of *six* peremptory strikes at issue. In fact, *every one* of the reasons proffered by the State to justify each of those six peremptory strikes applied equally to white veniremembers not removed by the State. *See supra* at 21-26.

This pattern of invoking certain characteristics to strike African American jurors when the same characteristics are ignored in white jurors presents a textbook case of "pretext." *Hernandez*, 500 U.S. at 363.[34] Indeed, especially in light of

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[34] *See McClain*, 217 F.3d at 1220-21 ("A prosectuor's motives may be revealed as pretextual where a given explanation is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge."); *Coulter*, 155 F.3d at 921 ("A facially neutral reason for striking a juror may show discrimination if that reason is invoked only to eliminate African-American prospective jurors and not others who also have that characteristic."); *see also Berry v. State*, 728 So. 2d 568, 572 (Miss. 1999) ("One of the recognized indicia of pretext is

the extreme statistical disparity in the State's use of its peremptory challenges, these inconsistently applied rationales are "simply too incredible" to be believed, *id.* at 369, and must be rejected. *See, e.g.*, *McClain*, 217 F.3d at 1222-23 (rejecting explanations regarding decision-making experience and education levels of African American veniremembers where explanations also applied to whites not excluded); *Jones*, 987 F.2d at 973-74 (rejecting as pretext the explanation that unmarried African American women were struck to eliminate possibility of attraction with defendant, where unmarried white women were allowed to serve); *see also Berry*, 728 So. 2d at 568 (finding pretext where State said it struck African American juror for being a housewife and similarly situated white juror was allowed to serve); *People v. Morales*, 719 N.E.2d 261 (Ill. 1999) (finding State's reference to African American veniremember's concern about length of trial was pretext, where State permitted white veniremember with same concern to serve).

Moreover, the State's contention that the racial disparity here was coincidence—and its race-neutral explanations genuine—evaporates when confronted by the overwhelming record evidence of Dallas County prosecutors' continuing, longstanding policy and practice to exclude African Americans from jury service. Examining this pattern and practice evidence is critical to a "sensitive inquiry" into all relevant evidence. *Batson*, 476 U.S. at 93 (quoting *Arlington Heights*, 429 U.S. at 266).[35] Yet the state trial and appellate courts ignored it entirely.

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disparate treatment, that is, the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge.") (internal quotations and citations omitted).

[35] Courts long relied upon such evidence under *Swain*. *See, e.g.*, *Horton v. Zant*, 941 F.2d 1449, 1455 (11th Cir. 1991) (*Swain* violation where, *inter alia*, defendant introduced statistical analysis of prosecutor's strikes, along with evidence that prosecutor had authored "memo designed to underrepresent blacks, women, and all individuals 18-24 years old" and had engaged in "questionable tactics" in prior case); *Love v. Jones*, 923 F.2d 816 (11th Cir. 1991) (*Swain* violated where, *inter alia*, defendant introduced testimony from lawyers who had observed a pattern and practice by DA's office of striking blacks from jury venires); *State v. Washington*, 375 So. 2d 1162 (La. 1979) (*Swain* violation where, *inter alia*, defendant introduced evidence of prosecutor's practice of striking African Americans). And, as noted *supra* at 40-41 & note 32, *Batson* continues to require an assessment of all relevant evidence.

The pattern and practice evidence—including the testimony of Dallas County judges and attorneys, official DA's office training materials, and the uncontested statistical analyses contained in the *Dallas Morning News*—establishes irrefutably that at the time of petitioner's trial, the Dallas County DA's office continued to pursue a longstanding policy of racial discrimination in jury selection. Indeed, the evidence confirms that the DA's office actually *trained* its prosecutors—including those who conducted jury selection in this case—to exclude African Americans from jury service, and that the policy was enforced with threats to fire those who disobeyed. *See supra* at 6-7.[36] Prosecutors pursued this exclusionary policy in a number of ways. Judge Entz, for example, testified to prosecutors' use of jury shuffles to minimize the chance that African American veniremembers would be called for voir dire. *See supra* at 7. And Judge Baraka testified that as recently as the year before

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[36] The state courts' failure to consider petitioner's pattern and practice evidence during the third stage of the *Batson* analysis constituted an independent violation of 28 U.S.C. § 2254(d)(1). A state court decision violates section 2254(d)(1) if it "involve[s] an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court of the United States." In this context, it is clear that the third stage of the *Batson* analysis should take into account all relevant evidence in the case. *See Batson*, 476 U.S. at 93 (noting that a court determining the existence of "purposeful discrimination" must "undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available'") (quoting *Arlington Heights*, 429 U.S. at 266). This is the clear teaching of *Batson* itself. *See Coulter*, 155 F.3d at 921 ("The *Batson* decision makes it clear that, one way or another, a trial court must consider all relevant circumstances before it issues a final ruling on a defendant's motion."). The state court's failure to consider petitioner's pattern and practice evidence was thus an unreasonable application of *Batson* itself.

petitioner's trial, a Dallas County prosecutor exercised his peremptory strikes in such a blatantly racist fashion that the judge felt obliged to ban the prosecutor from conducting similar voir dires in his courtroom in the future. *See supra* at 7-8. The result of these ongoing discriminatory tactics, as the *Morning News* documented, was that African Americans accounted for fewer than 4% of the jurors who served on felony trials in Dallas County between 1980 and 1986. *See supra* at 4-5. Moreover, 92% of the African American veniremembers removed by peremptory strikes during that period were removed by the prosecution. *See supra* at 4.[37]

In this case, *all* of the African American veniremembers removed by peremptory strikes—and 91% of the qualified African American veniremembers overall—were struck by the prosecution. Indeed, African Americans were *seven times* more likely than whites to be peremptorily struck by the prosecution in this case. These statistical disparities accord with the disparities across all Dallas County cases reported by the *Morning News*, and confirm that the prosecutors in this case used their peremptory challenges to do precisely what the Dallas County DA's office had been training its prosecutors to do for years: exclude African Americans from criminal juries.

The state courts' conclusion that the prosecution acted without regard to jurors' race is still more indefensible in light of the prosecution's use of racially discriminatory tactics in other stages of the jury selection in this very case. For example, the prosecution here employed jury shuffles in precisely the discriminatory fashion that Judge Entz had observed in past cases. When faced with randomly selected venire pools presenting African Americans toward the front, the State asked that the pool be shuffled. *See supra* at 11-12.

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37 Additionally, the Texas courts have concluded that the very prosecutors in charge of voir dire in this case were involved in the use of racially discriminatory jury selection tactics in other cases in the mid-1980s, at roughly the same time as petitioner's trial. *See supra* at 5.

It obtained the desired result: fewer African Americans appeared near the front of the venire and more were toward the back, thus diminishing the likelihood that they would even be subject to voir dire. And when in one instance the defense's exercise of its right to re-shuffle the pool caused African Americans to return to the front, the prosecution immediately cried foul, insisting that it be allowed yet another shuffle even though the law did not authorize it—and even though the alleged "foul" precisely described the prosecution's *own* conduct during previous shuffles. JA 60 The State's evident effort to remove African Americans through the jury shuffle strongly reinforces the conclusion that it persisted in that goal when exercising its peremptory strikes.

So too does the State's consistently disparate questioning of African Americans during voir dire. African American veniremembers were nearly ten times more likely than white veniremembers to be subjected to initial questioning about the death penalty that focused on the explicit details of lethal injection, *see supra* at 13-16,[38] and they were similarly far more likely to be questioned about the minimum sentence in a manner that attempted to disqualify them, *see supra* at 17-20. And based on this questioning, the State moved to have fully 60% of the African Americans subjected to voir dire removed for cause. The State's conduct during voir dire, like

---

38 The evidence shows that the prosecutors in this case were operating on the impermissible assumption that African Americans would "be unable impartially to consider the State's case against a black defendant." *Batson*, 476 U.S. at 80. To defend against this inevitable conclusion, the State has repeatedly noted that one African American, Troy Woods, served on the jury. But the inclusion of one African American hardly accounts for the exclusion of ten others, and it certainly cannot immunize the rest of the State's actions from constitutional scrutiny. *See Fernandez*, 286 F.3d at 1078; *Jones*, 987 F.2d 960. Moreover, as discussed above, the State accepted Woods only out of a perceived necessity, after hearing his extreme support for the death penalty, and even then only after some deliberation. *See supra* at 20-21.

its use of the jury shuffle, is highly probative of the intent behind its peremptory strikes. *See Batson*, 476 U.S. at 97.

In sum, the record in this case shows unmistakably that the State attempted first through jury shuffles to minimize the number of African Americans subject to voir dire, and then through voir dire and for-cause challenges to minimize the number of African Americans qualified for jury service. To conclude that the State then abandoned this strategy of race-based exclusion when exercising its peremptory strikes against virtually all the remaining African Americans would be "fantastic" indeed, *Purkett*, 514 U.S. at 768, especially in light of the extreme statistical disparity in those strikes, the prosecutors' implausible attempts to rationalize the disparity, and the fact that the prosecutors had been expressly trained to exclude African Americans from jury service. The cumulative evidence in this case is clear and convincing, and it permits only one reasonable conclusion: The prosecution's use of its peremptory strikes to remove 91% of the African Americans eligible to serve on petitioner's jury was the product of purposeful discrimination.

C. The Court Should Direct Issuance of the Writ.

The record in this case plainly satisfies the standard of section 2254(d)(2): the state courts' denial of petitioner's *Batson* claim was "based on an unreasonable determination of the facts in light of the evidence presented in the State [trial] court proceeding." This Court should therefore grant the relief petitioner seeks.

First, this Court should confirm that a factual record like the one in this case does indeed establish a *Batson* violation. If a court could reject *this* challenge, then there is essentially no case—short of one in which a prosecutor provides an on-the-record confession of purposeful discrimination—in which an appellate court can overturn an adverse factual finding in this area. The Court should therefore reverse the judgment below and direct issuance of the writ to make clear

to federal and state courts the quantum and nature of evidence that *require* reversal on *Batson* grounds.

The Court took a similar approach in *Slack*. The Court granted certiorari in that case to review a lower court's denial of a COA. The Court did not, however, limit its analysis to whether the petitioner's claim was sufficient to warrant issuance of a COA. Rather, after observing that the full merits of the issue had been discussed in the briefs, *see* 529 U.S. at 485, the Court determined not only that the petitioner had met the standard for a COA, but that he was correct on the merits.[39] The Court thus took the opportunity presented in *Slack* to clarify an important area of habeas law even though the case was formally before the Court in a more preliminary posture. So too here, the Court should reach and rule on the merits of petitioner's *Batson* claim (as expressed through section 2254(d)(2)) in order to clarify the kind of evidentiary record that warrants habeas relief in this area. If the lower courts are led to believe that this case presents no more than an arguable *Batson* violation (as is required for a COA to issue), other instances of discriminatory jury selection with less blatant records may go unremedied.

More fundamentally, if this record does not establish a *Batson* violation, then the burden on defendants in this area is just as "crippling" as it was under *Swain*, whose unduly burdensome standard *Batson* was designed to redress. *Batson*, 476 U.S. at 92. The standards this Court articulated in *Batson* were designed to "enforce[] the mandate of equal protection and further[] the ends of justice" by "requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges." *Id.* at 99. "In view of the heterogeneous population of our Nation," the Court

---

39 *See Slack*, 529 U.S. at 489 ("Slack has demonstrated that reasonable jurists could conclude that the District Court's abuse of the writ holding was wrong, for we have determined that a habeas petition filed after an initial petition was dismissed under *Rose v. Lundy* without an adjudication on the merits is not a 'second or successive' petition.").

observed, "public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race." *Id.* In this case, there is *both* the kind of systemic historical discrimination on which *Swain* turned *and* manifest case-specific evidence of discrimination and pretext. If state courts are permitted to reject *Batson* claims even in the face of such combined evidence, then *Batson* risks becoming a dead letter. The Court should grant the petition in this case to confirm *Batson*'s continuing force.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals and grant the petition for a writ of habeas corpus.

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part:

> Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2253(c) of Title 28, United States Code, provides:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Sections 2254(d) and (e)(1) of Title 28, United States Code, provide:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

APPENDIX B

(Excerpts of voir dire testimony)

* * * *

[2675] to try to stay around and go naturally, you know. I hope everybody else has the same idea in mind, but, you know, as far as just — if that man is executed there, you know, and you knowing that you was one of the twelve that actually had a hand in it, you know, obviously it's going to make you feel something.

Q Right. Right. Well, let me just try to kind of summarize what we've talked about, Mr. Mosley, and you correct me if I say anything wrong or say anything that you don't agree with. Let me ask you one other question. Have you felt this way about the death penalty for quite a long time?

A Yeah, ever since they first passed the deal, the law, whatever it was. You know, I just don't feel like it's just right from the beginning for anybody else to judge a man — take his life and call it legal.

Q Okay. Under any circumstances?

A Under any circumstances.

Q So you've felt this way for a long time and you feel that the death penalty is just not right and you can't have a hand in assessing in executing somebody?

[2676] A That's right.

Q Mr. Mosley,the last thing I want to do and the last thing anybody here should try to do is argue with you and change your mind. I'm not going to try to do that. I guess from what you've told me, even if I tried to, I couldn't. I mean, I could stand here and play lawyer with you and argue with you and switch things all around, but I'm not going to change your feelings about this, am I?

A No.

Q Okay. Those feelings that you've held for a long time, you're not going to change them today; is that right?

A That's right.

Q Well, Mr. Mosley, from what you're saying am I correct that you would refuse to take the oath to serve on this jury then knowing what your job would be; is that right?

A That's right. If I'm going to take the oath as far as the death penalty is concerned, yeah.

Q You understand, by taking that oath, you're saying that if the facts and circumstances justify it, I'll give the death [2677] penalty?

A If that's what the oath is about, well then, like I say, I would justly fear that taking the oath is not helping my conscience and it's not helping him.

Q That's fine. There's nothing illegal about not talking that oath. The law says that it is your option as a juror whether you take that oath or not. There's nothing illegal about not taking it. You have told me that you would refuse to take it and I believe you, Mr. Mosley. I'm not going to bother you any more. I'm not going to talk with you any more. I don't see any point in it. You've been very clear in expressing your feelings to me and I appreciate that. I appreciate your talking with me and being patient with me as we've gone through all this stuff. I appreciate your time very much. These lawyers will probably have some questions for you. They won't argue with you or try to change your mind, either.

MR. NELSON: Your Honor,we'll pass the juror and will submit the juror.

* * * *

[2738] THE COURT: I understand that. You don't have to change your feelings, but could you still answer those questions knowing what would happen to this man over here?

MR. MOSLEY: I would still have my feelings. I can't live with that.

THE COURT: But could you answer the questions if that's what the law and the evidence told you —

MR. MOSLEY: Yes. To go along with the law, I would do everything I possibly could to — but I wouldn't feel right knowing that I —

THE COURT: What you're saying is this: Regardless of how you feel, you would still base your verdict on what the evidence was and what the law was. That wouldn't change how you feel about the whole thing, but you [2739] would do your duty; is that what you're saying?

MR. MOSLEY: Say that again.

THE COURT: Are you saying that regardless of how you feel about it, you would do your duty and it wouldn't change how you feel, but you would do what the law and the evidence told you you had to do?

MR. MOSLEY: Right. I do what the law and the evidence tells me to do, but it's just hard to change my feelings.

THE COURT: Well, no one is asking you to change your feelings.

MR. MOSLEY: That is what I'm saying. I'm not saying nobody is asking me to do it, but I'm just answering you.

THE COURT: Going back to square one, what I brought you back in here for, you could take that oath to start out with —

[2740] MR. CUNNINGHAM: Your Honor, could you ask Mr. Mosley to step

outside?

THE COURT: Let me ask you to go out in the hall for a second while we argue some more law? We're going to get this law question resolved.

(Whereupon, Mr. Mosley left the courtroom, after which the following proceedings were held.)

THE COURT: I'm ready to rule. Have you-all got something?

MR. CUNNINGHAM: Sixty-one for sixty-four.

THE COURT: When is sixty-four coming in?

MR. CUNNINGHAM: A probation officer. I think the Court will agree that's probably —

THE COURT: Yes. Try to get a hold of Ms. Goeters and head her off. Have Mr. Mosley come back in, please.

[2741] (Whereupon, Mr. Mosley returned to the courtroom and the following proceedings were held.)

THE COURT: Mr. Mosley, we're going to excuse you from service in this case which means you won't be required to serve on this jury. We appreciate your patience with us this morning and your answers. I think I understood what you were saying very well. I don't think anybody here doubts how you feel, so you have my thanks.

First of all, I apologize, Ms. Williams, for being so late and so long in getting you in. Sometimes it goes very slowly. One of our other jurors took quite a bit of time to talk to. I would like to ask you, as much as possible, to make yourself comfortable and relax. As I said, I've got a

* * * *

[4328] about the death penalty, the fact that you couldn't kill somebody. Did you have those feelings even before he started getting into trouble?

A I think I've always had those feelings.

Q Okay. I hope you understand that no one here is trying to change those feelings. We're just trying to --

A I understand.

Q I guess what we're trying to do is get them down on paper for the court reporter and the Judge and make sure that we're clear on everything because I'm certainly not going to

argue with you and these lawyers over here shouldn't argue with you because I think you've made it very clear how you feel about things.

Just to kind of wrap things up, I want to try to summarize, if I can. You correct me if I say anything that you disagree with or I say anything that is wrong. You've told us that you've felt all your life basically that you can't be involved in killing another human being unless it is to save your own life; is that right?

[4329] A Yes.

Q Also because you have a son who has been in some trouble, you feel sympathy or whatever word you want to use for his family and the situation they're in and it is because of those things that you don't feel like you can sit on this jury and be part of sentencing a man to die; is that right?

A Right.

Q Ms. Keaton, based on that, if you were given a choice, which you will be, whether to take the oath or not take the oath to sit on this jury, would you refuse to take the oath and say, I just can't do it, Judge? Again, there's nothing great about serving on the jury and nothing bad about not serving. We just need to know because, if you don't feel like you can in good conscience sit on that jury and answer these questions,then no one is going to make you.

A I don't think I could.

Q Okay. So you would prefer not to take the oath; is that right?

A Right.

Q Ms. Keaton, we've been talking [4330] here for a half an hour or maybe a little bit more and no one is going to argue with you and, if I tried, I couldn't change your mind, could I, couldn't change your feelings about these things?

A No, you couldn't change my feelings.

Q No one is going to play lawyer with you and no one is going to try to change your feelings and no one should

argue with you. I think you've made them very clear. These lawyers over here may have some questions for you, but I'm sure they aren't going to argue with you or try to change your mind. By telling me what you've told me, I think it's pretty clear how you feel and I appreciate your honesty with me and your patience with us, also. Thank you very much, Ms. Keaton, and I've enjoyed talking with you.

MR. NELSON: Your Honor, I'll pass the juror and also submit the juror.

MR. CUNNINGHAM: Your Honor, we have a legal question we need to take up.

[4331] THE COURT: Okay. The best way to do this is maybe give you a little chance to get off the witness stand. I need to take a law question up with these lawyers, so let me ask you to step out in the hall.

(Whereupon, Ms. Keaton left the courtroom, after which the following proceedings were held.)

MR. CUNNINGHAM: Your Honor, we believe that Ms. Keaton is qualified through Wainright versus Wick, in that the State has not shown; one, that she could not take the oath; two, she has not said that she would automatically vote no to one of those questions to keeping him from getting the death penalty. Her last answers with respect to the oath were, "I don't think I could", "I would prefer not to." She has not positively stated "I will not take

* * * *

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No. 01-7662

Supreme Court, U.S.
FILED
JUL 29 2002
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IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,
Petitioner,

v.

JANIE COCKRELL, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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CONSTITUTIONS AND STATUTES

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28 U.S.C. § 2254	*passim*
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Thomas Joe Miller-El was tried and convicted of capital murder by a jury consisting of two white males, seven white females, an African-American male, a Filipino-American male, and a Latino male. In selecting that jury, the prosecution consistently employed all permissible means to identify and remove venire members with unfavorable views on the death penalty, regardless of their race. The vast majority of non-minority panelists favored the death penalty and were willing to impose it, while the vast majority of African-American panelists were either opposed to the death penalty or were unwilling to impose it. Thus, to the extent that a greater percentage of African-Americans were struck, those percentages mirror the divergent views on the death penalty of minority and non-minority venire members. Based on this Court's established equal protection jurisprudence, a peremptory challenge constitutes a violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), only if the prosecutor struck a juror because of the juror's race. A *Batson* violation cannot be founded on the sins of the father, nor can it be based merely on a showing of a disparate impact. Miller-El simply cannot overcome the credibility determination of the trial judge that the State did not exercise peremptory challenges based on race at his trial. Peremptory strikes are used to eliminate venire members whose views are not so extreme as to render them challengeable for cause. Thus, the decision whether to strike them must be based on an evaluation of the totality of their responses, as well as their demeanor and other intangibles. Acceptance of Miller-El's submission would prevent the parties from exercising their professional judgment in this regard and instead would require the acceptance of any minority venire member who was not so biased as to be subject to a challenge for cause.

STATEMENT OF THE CASE

In the pre-dawn hours of November 16, 1985, Thomas Joe Miller-El and co-defendant Kennard Flowers robbed a Dallas

motel at gunpoint. Motel employees Donald Hall and Doug Walker complied with all Miller-El's demands, handing over the cash drawer, opening the combination lock to the bellman's closet, and turning over their own valuable personal property. Miller-El and Flowers then bound and gagged the victims. After Flowers left the scene, Miller-El shot Hall and Walker twice each in the back as they lay face down in the bellman's closet. Hall survived to testify at Miller-El's trial, although Miller-El's shots had severed his spine, rendering him a paraplegic. Walker died on the bellman's closet floor.

I. JURY SELECTION

A. The State's race-neutral, case-related reasons for striking prospective jurors

Jury selection began in February 1986. The venire consisted of 108 members, 65 of whom participated in individual voir dire.[1] Nine venire members were excused based on the State's challenge for cause, the trial court finding in each case that the venire member's views concerning the death penalty would substantially impair his or her ability to serve as a juror pursuant to *Wainwright v. Witt*, 469 U.S. 412 (1985).[2] Three additional venire members were excused by agreement of the parties at the State's request in exchange for agreements to excuse venire members of the defense's choosing; two of

[1] Forty venire members were excused by agreement of the parties without voir dire, and three were excused by the trial court without voir dire.

[2] John Nelson (Voir Dire Record ("VDR") 2:663); Harold Sohner (VDR 2:716-717); Virginia Smith (VDR 2:1005); Linda Berk (VDR 3:1478); Gene Hinson (VDR 4:1696); Jeanette Butler (VDR 4:1945); Louise Carter (VDR 4:1998); Sheila White (VDR 5:2101); Joyce Willard (VDR8:3153).

these venire members had expressed opposition to the death penalty,[3] and the other had expressed ambivalence about the death penalty.[4]

The State exercised peremptory challenges to remove an additional fourteen venire members. Four of these venire members had stated they were opposed to the death penalty but had been held qualified to serve under *Wainwright v. Witt* after stating they could render a verdict according to the evidence.[5] Eight of the panelists struck by the State had expressed ambivalence about the death penalty or their ability to impose it (as well as other factors in some instances).[6] The remaining two venire members struck by the State had expressed pro-defense views regarding rehabilitation.[7]

Ten of the fourteen venire members struck by the State were African-American. As to each African-American panelist challenged, the State proffered race-neutral, case-related reasons for exercising the challenge.

Roderick Bozeman, the first African-American venire member interviewed, stated that while he believed in the death penalty as a general proposition, he thought it was only appropriate "if there's no possible way to rehabilitate a person," for instance, a "mentally disturbed" person or "a Manson type." JA 79. If he thought there was a chance the defendant could be rehabilitated, he did not think the death

[3] Clara Evans (VDR 6:2588, 2638); Jerry Mosley (VDR 7:2656, 2740).

[4] Leta Girard (VDR 6:2542, 2575).

[5] Margaret Gibson (VDR 2:485, 523); Janice Mackey (VDR 10:4022); Paul Bailey (VDR 11:4140, 4168); Anna Keaton (VDR 11:4373-74).

[6] Roderick Bozeman (Joint Appendix ("JA") 78, 81); James Holtz (VDR 2:1018-19); Joe Warren (JA 139, 140, 142, 144, 146); Edwin Rand (JA 161); Carrol Boggess (JA 192, 194, 196, 197); Wayman Kennedy (JA 216, 217, 225); Linda Baker (VDR 8:2990-91); Charlotte Whaley (VDR 10:3748).

[7] Billy Jean Fields (JA 118); Penny Crowson (VDR 3:1211).

penalty was appropriate. JA 89. Furthermore, according to Bozeman, repeated criminal acts of violence would not necessarily indicate that a person was beyond rehabilitation. JA 79. Bozeman classified himself as the type of person who believes in the death penalty in principle, but who could not actually serve on a capital jury. JA 79-80. Finally, Bozeman stated that even if the evidence compelled "yes" answers to the special issues, he might refuse to answer the questions honestly in order to avoid imposing the death penalty. JA 90-91. The State exercised a peremptory challenge to remove Bozeman, citing his views on the death penalty and on rehabilitation, his "obvious hesitation" concerning his ability to override his personal feelings and answer the special issues according to the evidence, and his belief that a prior pattern of conduct would not be sufficient to render a defendant deserving of a death sentence.[8] JA 102.

Prospective juror Billy Jean Fields stated that he believed in the death penalty and could serve on a capital jury. JA 108, 111. However, after noting that the possibility of rehabilitation would be a factor he would consider in assessing a death sentence, Fields asserted his personal religious belief that no one is beyond rehabilitation. JA 118. As Fields concluded, ". . . I feel like, if a person has the opportunity to really be talked [to] about God and he commits himself, whereas he has committed this offense, then if he turns his life around, that is rehabilitation. . . . I feel like when an individual has really been truly reached by someone reading the word of God to him and they are repentant and they do have a real act of contrition, they can be rehabilitated and that's been demonstrated." JA 118. Additionally, as

[8] With the exception of venire members Joe Warren and Paul Bailey, *see* Note 64, *infra*, the State set forth its race-neutral reasons for exercising these peremptory challenges immediately after exercising the strikes. At the subsequent *Batson* hearing, the State merely asked that the trial judge take judicial notice of that prior testimony. JA 866-68.

reflected in both Fields' questionnaire and in questioning by the State, Fields' brother had been convicted numerous times in Dallas County for drug offenses. JA 124. The prosecution exercised a peremptory challenge to remove Fields, citing its concern that the prospective juror's deeply-religious belief in the rehabilitative capacity of all persons could impact his willingness to impose a death sentence and the fact that the juror's brother had been convicted of a felony.[9] JA 131-133.

Venire member Joe Warren repeatedly answered questions posed by the prosecutor in a noncommital manner, indicating ambivalence about the death penalty and his ability to impose it. When asked whether he believed in the death penalty, Warren stated, "there are some cases where I would agree, you know, and there are others that I don't." VDR 3:1526.[10] When the prosecutor described the crimes defined as capital murder under Texas law and asked whether Warren felt the death penalty could be an appropriate punishment for such crimes, Warren responded, "Well, there again, I would say it depends on the case and the circumstances involved at the time." JA 139. When asked whether the death penalty serves a purpose, Warren answered, "Yes and no. Sometimes I think it does and sometimes I think it don't. Sometimes you have mixed feelings about things like that." JA 140. When asked whether he could make a decision between a life sentence and a death sentence, Warren equivocally replied, "I think I could." JA 142. When questioned about his ability to answer the future dangerousness special issue, Warren responded, "I suppose there's always that chance, but there again, you never know." JA 144. Finally, Warren stated, "Well, it's just like I said you know. There are cases, I mean,

[9] Contrary to Miller-El's assertion, *see* Petitioner's Brief at 24-25, the prosecutor did not cite as a reason for its strike Fields' adherence to the Catholic faith. Rather, the prosecutor cited Fields' religious-based beliefs regarding rehabilitation. *See* JA 132.

[10] This response was edited from the joint appendix. *See* JA 137.

personally, that I feel I wouldn't want to personally be, you know, involved with it if I had a choice. . . ." JA 146. The State exercised a peremptory challenge to remove Warren. Subsequent to Miller-El's trial, at a hearing held in the trial court pursuant to *Batson v. Kentucky*, the prosecutor cited Warren's hesitation about imposing the death penalty and his inconsistent responses during voir dire as bases for his strike.[11] JA 857. The prosecutor also noted that Warren was struck relatively early in the jury selection process when the State still had several peremptory challenges remaining.[12] JA 855, 859. As the prosecutor observed, an attorney's strategy regarding the use of peremptory challenges necessarily changes as jury selection progresses: Early in the process, an attorney flush with challenges might feel free to strike a marginal juror; whereas, later in the process, the attorney must be more cautious in expending the precious remaining strikes. JA 856, 859, 862-63. According to the prosecutor, had Warren been examined when the State had only one strike remaining, the prosecutor would not have exercised a challenge to remove him.[13] JA 859.

While venire member Edwin Rand had indicated on his questionnaire that he believed in the death penalty, at the outset of individual voir dire he described capital punishment as a "touchy subject." JA 158. Further into the examination, the prosecutor asked Rand whether he would describe himself as (1) a person who believes in the death penalty and can

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[11] Defense counsel did not object to the State's exercise of a peremptory strike against Warren contemporaneous with the strike. JA 154. Therefore, the State did not offer race-neutral reasons at that time.

[12] Warren was twenty-eighth of 108 venire members. JA 68. The State still had nine peremptory challenges remaining after exercising a challenge to remove Warren. JA 856.

[13] On cross examination by defense counsel, the prosecutor testified that he would have struck jurors Sandra Hearn and Fernando Gutierrez before Warren had they come up earlier in the process. JA 861-62.

serve as a juror and assess the death penalty if warranted; (2) a person who believes in the death penalty but for whatever reason cannot actually participate as a juror and be involved in assessing the death penalty; (3) a person who does not believe in the death penalty but could render a verdict according to the evidence; or (4) a person who does not believe in the death penalty and cannot participate as a juror in the assessment of a death sentence. JA 160. Rand described himself as falling "[p]robably in between the first two, sitting in the jury and being able to say, 'Okay, he's guilty.' and being able to do that. But again, somewhere along the line, I would probably think to myself, you know, 'Can I do this?' You know, right now I say I can, but tomorrow I might not." JA 161. The State exercised a peremptory challenge to remove Rand, citing his ambivalence about the death penalty generally and his ability to serve on a capital jury. JA 187.

Prospective juror Carrol Boggess also left the unmistakable impression that she was uncertain and hesitant about administering a death sentence. On her juror questionnaire, she answered affirmatively the question "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?" Joint Lodging ("JL") 44. During individual voir dire, when asked about her views concerning the death penalty, Boggess responded, "Well, I believe I could serve on a case like this, but whether I want to or not is a different thing. I wouldn't want to serve and I wouldn't want to have that responsibility to do that, but if it fell upon me, I would certainly take it and pray to the Lord to help me get through it." JA 192. Later she stated, "I'm not saying that I feel like I could impose the sentence myself—or I'm not going to be imposing the sentence, is that correct?" JA 194. After that, when asked whether she could vote for death, she stated, "I've never been in that situation. I don't feel like I would want to be in that situation and

whether I could do it or not, I'm not real sure." JA 196. Then Boggess stated, ". . . but now whether or not I could actually go through with *murder*—with killing another person or taking another person's life, I just don't know. I'd have trouble with that." JA 197 (emphasis added). Additionally, Boggess had indicated on her juror questionnaire that she had testified as a defense witness at her nephew's theft trial. JL 43. The State exercised a peremptory challenge to remove Boggess, citing as reasons for the strike her hesitancy about assessing a death sentence and the fact that she had served as a defense witness in her nephew's theft trial. JA 211.

Venire member Wayman Kennedy stated on his juror questionnaire that he believed in the death penalty "only in extreme cases." JL 51. He echoed that sentiment during individual voir dire, stating that he really only believed in the death penalty for mass murders or cases involving mutilation. JA 216. Kennedy questioned whether the death penalty could be appropriate punishment for a murder committed in the course of a robbery: "To me, it would like, if it was just a normal robbery, why wouldn't a life sentence be enough. . . ." JA 217. Finally, when asked whether he could answer the special issues "yes" if proved beyond a reasonable doubt, even if he personally felt the defendant should not be sentenced to death, Kennedy replied, "I think I could. . . ." JA 225. The State exercised a peremptory challenge to remove Kennedy, citing his hesitancy to assess the death penalty for murder in the course of robbery (for which Miller-El stood accused), his view that the death penalty is only appropriate for mass murder, and the fact that "he hesitated for a great deal of time" before stating that he could answer the special issues according to the evidence. JA 248-249.

Miller-El does not challenge the State's strikes of the four other African-American venire members. It should be noted, however, that three of the four stated both in their juror questionnaires and during individual voir dire that they were

opposed to the death penalty.[14] They were held qualified under *Wainwright v. Witt* nonetheless based on their statements that they could render a verdict according to the evidence. The fourth of these venire members expressed ambivalence about the death penalty and indicated both in her juror questionnaire and during individual voir dire that she could not personally assess a death sentence.[15]

B. Wide divergence of views on capital punishment of African-American and non-minority venire members

Much of the foundation for Miller-El's *Batson* claim is statistical, i.e., that the State exercised ten of its fifteen peremptory challenges to remove ten of eleven qualified African-American venire members. *See* Petitioner's Brief at 6, 20, 42. Miller-El does not mention, however, the marked disparity between the views of the non-minority venire members and the views of the African-American venire members.

In fact, of those who participated in individual voir dire, more than seventy percent of non-minority venire members had no qualms about either the death penalty generally or their willingness to impose the death penalty in an appropriate case. Only seven of forty-eight non-minority venire members indicated they were opposed to the death penalty;[16] two additional non-minority venire members indicated that, while they believed in the death penalty, they could not personally impose a capital sentence;[17] four additional non-

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[14] Mackey (VDR 10:3949, 3951); Bailey (VDR 11:4110); Keaton (VDR 11:4307-08, 4314).

[15] Baker (VDR 8:2990-91, 2996-97, 2998).

[16] Gibson (VDR 2:485); Nelson (VDR 2:605); Sohner (VDR 2:676); Berk (VDR 3:1449); Dominick Desinise (VDR 3:1483, 1485); Hinson (VDR 4:1649); Evans (VDR 6:2588).

[17] White (VDR 5:2054); Willard (VDR 8:3093).

minority venire members made ambivalent statements during their voir dire examinations about the death penalty or their willingness to impose it.[18]

Conversely, about sixty-seven percent of African-American venire members stated that they were either opposed to the death penalty or unwilling to sentence someone to death.[19] Three additional African-American venire members expressed ambivalence about either the death penalty generally or their willingness to impose it.[20] Only two of fifteen African-American venire members expressed no qualms about either the death penalty generally or their willingness to impose it.[21]

C. The State's consistent treatment of similarly situated venire members

The record shows that the State approached similarly situated venire members on equal grounds. The State pursued challenges for cause to remove numerous non-minority panelists who had expressed opposition to or ambivalence concerning the death penalty.[22] The State secured the excusal by agreement of two additional non-minority venire members who had expressed opposition or ambivalence.[23] Finally,

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[18] Holtz (VDR 2:1018, 1031); Noad Vickery (VDR 4:1571-72, 1574); Girard (VDR 6:2522); Whaley (VDR 10:3748.

[19] Bozeman (JA 79-80); V. Smith (VDR 2:927-928); Butler (VDR 4:1889); Carter (VDR 4:1958); Boggess (JL 44; JA 192, 194); Mosley (VDR 7:2656); Baker (VDR 8:2990-91, 2996); Mackey (VDR 10:3949); Bailey (VDR 11:4110); Keaton (VDR 11:4307-08, 4314).

[20] Warren (JA 139, 140, 142, 144, 146); Rand (JA 161); Kennedy (JA 216, 225).

[21] Fields (JA 108, 111); Woods (JA 255-56).

[22] Nelson (VDR 2:663); Sohner (VDR 2:716-17); Berk (VDR 3:1478); Hinson (VDR 4:1696); White (VDR5:2101); Willard (VDR 8:3153).

[23] Girard (VDR 6:2542, 2575); Evans (VDR 6:2638).

when challenges for cause were unavailing, the State peremptorily struck three non-minority venire members who had expressed opposition to or ambivalence concerning the death penalty.[24] Significantly, the State also peremptorily struck a non-minority venire member who had expressed a firm belief in the death penalty but who also stated that she would probably not assess a death sentence if she believed there was a chance the defendant could be rehabilitated.[25]

None of the non-minority venire members who were selected to serve on Miller-El's jury shared views or circumstances comparable to those of the challenged African-American panelists. Sandra Hearn stated firmly both in her juror questionnaire and throughout individual voir dire that she believed in the death penalty and could assess the death penalty in an appropriate case. VDR 11:4541, 4580-81. While she expressed a belief that someone should not be sentenced to death on a first offense, she made it clear that the prior offense would not have to be a murder, it could be a robbery or some other lesser criminal act of violence. VDR 11:4541-43, 4562. She stated that she personally felt the death penalty should be available for not only murder, but also severe torture and extreme child abuse. VDR 11:4544. Hearn also volunteered that she had a great deal of respect for police officers based on the facts that her father was a retired FBI agent and that she had daily contact with police officers through her employment. VDR 11:4570-72, 4578. Defense counsel apparently recognized that Hearn was a prosecution-prone venire member, submitting her for challenge for cause on numerous grounds.[26] VDR 11:4610. When the trial judge

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[24] Gibson (VDR 2:485, 523); Holtz (VDR 2:1018-19); Whaley (VDR 10:3748).

[25] Crowson (VDR 3:1211).

[26] Furthermore, as the prosecutor testified at the *Batson* hearing, Hearn may well have been struck by the State as a "marginal" juror had she been examined earlier in the jury selection process. JA 862.

found her qualified, defense counsel objected to her being seated as a juror and asked for additional peremptory challenges.[27]

Likewise, juror Marie Mazza's views regarding the death penalty were qualitatively different than those held by the challenged African-Americans. Mazza had indicated on her juror questionnaire that she believed in the death penalty. When asked about her feelings concerning the death penalty during individual voir dire, she stated, "It's not an easy one and I feel that it depends upon the case, the testimony. . . . It's kind of hard determining somebody's life, whether they live or die, but I feel that is something that is accepted in our courts now and it is something that—a decision that I think I could make one way or the other. . . . Toying with my religious upbringing, my family upbringing and such, it depends upon how I feel that the testimony was presented to me and that would be something that I would feel like I could do. It's difficult." VDR 5:2310-11. Nonetheless, Mazza subsequently denied that these feelings were grounded in her religion or upbringing. VDR 5:2312. She ultimately admitted that her hesitance was grounded in concern for what her acquaintances who were opposed to the death penalty would think of her if she served on a capital jury rather than her own internal views regarding the death penalty. VDR 5:2312. Thereafter, Mazza stated that the death penalty exists for a reason, commenting that murderers gave their victims no mercy. VDR 5:2314. For the remainder of the examination, Mazza expressed no hesitancy concerning her ability to assess a death sentence in an appropriate case. VDR 5:2314, 2317-18. In contrast, African-American venire member Warren was so extremely noncommital in his responses to the State's questioning that it is difficult to determine what his views were. JA 139, 140, 142, 144, 146.

[27] The defense had expended its last peremptory challenge to remove the previous venire member, Max O'Dell. VDR 11:4526.

And when asked whether he could impose the death penalty, African-American venire member Rand responded "right now I say I can, but tomorrow I might not." JA 161.

The record also shows that Ronald Salsini was a prosecution-friendly venire member, at least in this case. When asked about his views regarding capital punishment during individual voir dire, Salsini stated, "I believe in the death penalty because it is a good deterrent and everything—the only deterrent for a crime like that. As far as—is it my decision as far as on a jury, I think I could make the decision, but I would really have to think about it long and hard before I could make that decision." VDR 5:2248. While Salsini did make some comments that could be construed as hesitance about assessing a death sentence in certain circumstances, VDR 5:2249, 2251, 2254, one particular portion of his voir dire clearly set him apart from the challenged venire members. When asked what types of crimes he felt might warrant a death sentence, Salsini, a former bank teller, volunteered a hypothetical crime that eerily parallels the facts of this case:

> If after [the victim complies with the robber's demands], then a person would shoot them with no real reason or, you know, if there was a threat to the person committing the crime—say he's committing the crime and he's an armed robber and there is no threat to him at all and he stills go ahead and shoots somebody and kills them, that I think should be punished with capital.

VDR 5:2256. The State accepted Salsini as a juror and the defense struck him.

Similarly, the non-minority jurors who Miller-El claims held pro-defense views concerning rehabilitation are not situated similarly to African-Americans struck on this basis.[28]

[28] The State cited views on rehabilitation as grounds for the strikes of only two African-Americans: Bozeman and Fields. Furthermore, as discussed above, their views on rehabilitation did not provide the sole basis for the strike in either case.

Again, juror Hearn stated unequivocally that, while she believed someone should not be sentenced to death for a first offense,[29] she could base a death sentence on the facts of the crime and evidence of prior violent crimes. VDR 11:4541-43, 4562. In contrast, Bozeman testified that he did not believe the death penalty should be imposed as long as there was a chance the defendant could be rehabilitated and that evidence of prior violent conduct was not necessarily an indication that a person was beyond rehabilitation.[30] JA 79, 89. Juror Kevin Duke also expressed clear support for the death penalty and confidence in his ability to assess it in an appropriate case, VDR 8:3264-66, and his positive views about rehabilitation were made not in the context of testing Duke's ability to assess a capital sentence, but in response to defense counsel's questioning of the juror's ability to disregard the possibility of parole in assessing the minimal allowable sentence (five years) for the lesser-included offense of simple murder. VDR 8:3313-14. Fields' views concerning rehabilitation stand in sharp contrast to those of any other prospective juror of any race because his views were rooted in his deeply held religious belief that all persons can be rehabilitated. JA 118.

Finally, the non-minority venire members who had family members with criminal backgrounds are clearly distinguishable from those African-Americans whom the State struck on

[29] As Hearn stated, "I think when a murder is committed, whether it is purposely or—a sixteen year old boy or something, this is his first offense, no I do not believe in the death penalty there. I think that he ought to be given a chance to have rehabilitation." VDR 11:4583-84.

[30] Bozeman's views were even more extreme than those of Penny Crowson, a non-minority venire member whom the State peremptorily struck. Crowson had expressed a firm belief in the death penalty but also stated that she would probably not assess a death sentence if she believed there was a chance the defendant could be rehabilitated. VDR 3:1211.

this basis.[31] Noad Vickery testified that his sister had been arrested and had served time in a California penitentiary when he was a teenager. VDR 4:1601-02. Vickery was fifty years old at the time of jury selection.[32] JL 65. Cheryl Davis testified that her husband had been convicted of theft in Dallas County ten years earlier and had received a seven-year probated sentence.[33] VDR 9:3469-70. Chatta Nix testified that her brother, who owned a construction company, had recently entered into a plea bargain with the United States Attorney's Office for his involvement in a well-known white-collar construction loan scandal. VDR 5:2379-80. Nix, who worked as office manager at her brother's company, had also been named in a separate civil lawsuit along with "thousands of others" filed by the Federal Savings and Loan Insurance Corporation.[34] VDR 5:2380-82. Finally, Joan Weiner testified that her ten-year-old son had once been arrested for

[31] The State cited the criminal histories of family members as grounds for the strikes of only two African-Americans: Fields and Boggess. Furthermore, as discussed above, this did not provide the sole basis for the strike in either case.

[32] The defense submitted Vickery for challenge for cause on the basis that he could not assess the minimum sentence for the lesser-included offense of murder. VDR 4:1626. After the trial judge held that Vickery was qualified, the defense exercised a peremptory challenge to remove him from the panel. VDR 4:1632, 1635-36. While defense counsel did not provide any reason for striking Vickery, it is apparent even on a cold appellate record that Vickery did not like defense counsel.

[33] The balance of Davis' voir dire examination reveals that she was otherwise a strong State's juror. VDR 9:3433-3499. The defense submitted Davis for challenge for cause on the basis that she could not assess the minimum sentence for the lesser-included offense of murder. VDR 9:3478. After the trial judge held that Davis was qualified, the defense exercised a peremptory challenge to remove her from the panel. VDR 9:3491, 3499.

[34] Nix's voir dire examination indicates that she was otherwise a strong State's juror. VDR 5:2345-2399. The defense exercised a peremptory challenge to remove her from the panel. VDR 5:2399.

shoplifting and she had to pick him up at the police station.[35] VDR 5:2141, 2158. These circumstances are qualitatively different from those of Fields and Boggess. Fields' brother had served time in prison numerous times for drug convictions in Dallas County. JA 124. Boggess had testified as a defense witness at her nephew's theft trial. JL 43.

D. Disparate questioning of venire members based on venire members' views, not race

The record in this case reveals that the State's litmus test for prospective jurors was their views on capital punishment. This was the most significant motivating factor in not only its exercise of challenges for cause and peremptory challenges but also its questioning of prospective jurors. Prosecutors employed disparate questioning to ferret out venire members whom they felt might hesitate when it came to imposing the ultimate punishment. They also employed disparate questioning in attempts to disqualify venire members who had expressed what prosecutors perceived to be unfavorable views but who were not subject to disqualification on those grounds. However, they did not employ disparate questioning based on race. Rather, prosecutors utilized these legitimate jury selection tactics, aiming to identify and remove prospective jurors who had expressed views unfavorable to the State.

As Miller-El asserts, the prosecution used divergent questioning methods in two areas: venire members' feelings about the death penalty and venire members' ability to impose the minimum punishment for the lesser-included offense of murder.

The State questioned all prospective jurors at length regarding their views on capital punishment. With the vast majority of venire members, prosecutors simply informed

[35] Weiner served on Miller-El's jury.

them that the State was actively seeking the death penalty and that affirmative answers by the jury to the three questions submitted at the punishment phase would result in Miller-El being given the death penalty, then asked them an open-ended question concerning their feelings on capital punishment. With some prospective jurors, however, prosecutors described an execution in vivid detail, no doubt, as Miller-El contends, "to prompt more negative feelings about service in a death case" in hopes of disqualifying the jurors on legal grounds. Petitioner's Brief at 14. Nonetheless, the record does not support Miller-El's argument that this disparate questioning was based on race.

The African-Americans questioned with the "graphic script" at the outset of their examinations had expressed reservations about the death penalty in their juror questionnaires. On her questionnaire, Carrol Boggess answered affirmatively the question "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?" JL 44. Wayman Kennedy stated on his questionnaire that he believed in the death penalty "only in extreme cases." JL 51. Linda Baker stated on her questionnaire "[m]y strongest feeling is against the death penalty" and wrote "undecided" in response to the question "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?" Defense Exhibit ("DX") 7.[36] Troy Woods wrote "no" in response to the question "Do you believe in the death penalty?" JL 180. Janice Mackey wrote "no" in response to the question "Do you believe in the death penalty?" and added "Thou shall not kill." DX 7. In response to the question "Do you believe in

[36] This exhibit may be found in the record of the *Swain* hearing conducted on March 12, 1986.

the death penalty?" Paul Bailey circled "yes" then wrote in "no." DX 7. Anna Keaton wrote "no" in response to the question "Do you believe in the death penalty?" DX 7.[37]

Likewise, some non-minority jurors who had expressed reservations about the death penalty were questioned using the same graphic formulation.[38] For both African-American and non-minority panelists, however, not all panelists who had expressed reservations about the death penalty were questioned with the graphic formulation.[39] On the other hand, venire members who had not expressed reservations about the death penalty in their juror questionnaires, whether African-American or white, were not given the "graphic script" at the outset.[40]

The State also did not question African-Americans differently than non-minority venire members concerning their willingness to impose the minimum punishment for the lesser-included offense of murder.[41] Again, prosecutors did

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[37] Jeanette Butler's juror questionnaire is not contained in the record. However, her voir dire examination reveals that while she believed in the death penalty in principle, she was unwilling to participate as a juror in imposing a death sentence. VDR 4:1889.

[38] Desinise (VDR 3:1483-84); Evans (VDR 6:2585-86). Prospective juror Sztybel was also questioned with the graphic formulation even though she had never expressed reservations about the death penalty. (VDR 7:2828)

[39] Gibson (VDR 2:483); Nelson (VDR 2:603); V. Smith (VDR 2:926); Holtz (VDR 2:1016-17); Berk (VDR 3:1440-41); Hinson (VDR 4:1646); Carter (VDR 4:1951-52); White (VDR 5:2053); Girard (VDR 6:2520-21); Mosley (VDR 7:2654-55); Willard (VDR 8:3090-91).

[40] Bozeman (JA 77-78); Fields (JA 106-107); Warren (JA 137); Rand (JA 157-158).

[41] Unlike the "graphic script" questioning, which occurred at the outset of an examination, the minimum punishment questioning generally occurred toward the end of the examination; therefore, the State had not only the prospective juror's questionnaire to consider but also his previous voir dire responses.

utilize disparate questioning, but not based on race. With most venire members, prosecutors identified the minimum penalty first, then asked whether the venire member could impose it. But with some, prosecutors employed a tactic by which they described the offense of murder, then asked what the prospective juror thought the minimum punishment should be, before informing him of the range allowed by law. However, the State did not engage in this divergent questioning based on race. The record clearly shows that the prosecution employed this tactic with several venire members, both African-American and not, who had expressed views that, while not rendering them subject to a challenge for cause, were unfavorable to the State.[42]

On this point, Miller-El makes two serious misstatements of the record. First, he asserts that the State used this tactic "with all but one of the African-American jurors." Petitioner's Brief at 17. In fact, prosecutors employed this line of questioning with only seven of fifteen African-American venire members.[43] Furthermore, all the venire members questioned in this manner, whether African-American or not, had expressed views unfavorable to the prosecution. Miller-El further contends that the State employed the friendlier line of questioning "[w]ith forty-seven of forty-nine white jurors," Petitioner's Brief at 17, but the record shows that only thirty-four white jurors were questioned in this manner.[44] Twelve white jurors were not

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[42] Bozeman (JA 94-95); Fields (JA 121-22); Gibson (VDR 2:507-11); Holtz (VDR 2:1046-50); Warren (JA 148); Rand (JA 165); Boggess (JA 204-05); Kennedy (JA 225, 226); Baker (VDR 8:3007-08); Fernando Gutierrez (VDR 11:4396).

[43] Bozeman (JA 94-95); Fields (JA 121-22); Warren (JA 148); Rand (JA 165); Boggess (JA 204-05); Kennedy (JA 225, 226); Baker (VDR 8:3007-08).

[44] Don Hambrick (JA 280-83); Emily Williams (JA 285-87); Darol Weigant (JA 289-91); Mary Sumrow (VDR 1:356-57); Carol Taylor (JA

questioned at all on the issue of minimum punishment.[45] Two white jurors were questioned using the formulation challenged by Miller-El.[46]

In contrast, the majority of African-Americans expressed reservations about the death penalty, so the majority of African-Americans were questioned in a manner intended to either identify them as unfavorable jurors or disqualify them from jury service. For instance, African-American juror Troy Woods had indicated on his juror questionnaire that he did not believe in the death penalty. JL 180. Therefore, not surprisingly, the State led off its examination of Woods with a graphic description of an execution. JA 252. However, once it became clear that Woods was, in fact, a prosecution-friendly juror—that his expression of opposition to the death penalty was grounded, not in any personal or moral opposition to capital punishment, but in his belief that lethal injection was too lenient a mode of punishment—the State sought to qualify him on minimum punishment as it had all other prosecution-friendly venire members. JA 264-266.

362-64); Billy Wagoner (JA 370-73); Sandra Jenkins (JA 385-87); Colleen Moses (JA 391-92); Penny Crowson (VDR 3:1232); Gwendolyn Smale (JA 398-401); Ronnie Long (JA 403-05); Vickery (433-35); Weiner (JA 506-10); Salsini (JA 514-16); Mazza (JA 519-22); Nix (524-27); Mary Witt (JA 532-34); Doris Williams (JA 545-48); Sztybel (JA 550-53); Charles Smith (JA 556-59); Debra McDowell (JA 569-72); Virginia Webb (JA 576-80); Duke (JA 582-86); Louis Wolters (590-92); Davis (JA 596-98); Gary Spence (JA 602-08); Carol King (JA 612-16); Whaley (VDR10:3768); Catherine Barnard (JA 621-25); Susan Page (JA 628-31); Brenda Walsh (JA 636-39); Russell Jones (JA 645-50); Max O'Dell (JA 686-91); Hearn (JA 694-97).

[45]Nelson (VDR 2:598-631); Sohner (VDR 2:668-98); Berk (VDR 3:1437-68); Hinson (VDR 4:1640-70); White (VDR 5:2050-73); Willard (VDR 8:3088-3119).

[46]Gibson (VDR 2:507-11); Holtz (VDR 1046-50).

E. Jury shuffles

The State requested and received jury shuffles the first, second, and third weeks of jury selection, then declined shuffles the fourth and fifth weeks of jury selection; the defense requested and received shuffles all five weeks. During the first three weeks of jury selection, the jury shuffles were conducted in the central jury room without the trial judge present, pursuant to an agreement between the parties consistent with Dallas County practice. Counsel for the State physically conducted the State's shuffles, and counsel for the defense physically conducted the defense's shuffles.

During the first week, both the State and the defense requested and were granted shuffles, but the record does not reflect the racial makeup of the first week's venire. JA 45-46. On the second week, the State requested a shuffle, and the defense immediately put on the record that four of the first ten venire members were African-American, three of the second ten were African-American, two of the third ten were African-American, and one of the fourth ten was African-American. VDR 2:837. The State's request for shuffle was granted, then the defense requested and was granted a shuffle. VDR 2:837, 839. The record does not reflect the racial composition of the venire either after the State's shuffle or after the defense's shuffle.

On the third week of jury selection, the State requested and received a shuffle, to which the defense did not object, then the defense requested and received a shuffle. JA 57-58. During defense counsel's shuffle in the central jury room, the prosecutor protested, claiming that defense counsel had not shuffled the juror cards thoroughly enough. JA 57-58, 60-61. Defense counsel suggested that the prosecutor take it up with the judge. JA 57, 58, 60-61. After the shuffles were completed, but before the newly shuffled venire was reseated, counsel for both the State and the defense went to the judge's chambers; the prosecutor informed the judge that he had a

problem with the way the defense had conducted its shuffle, but that he was still investigating the issue. JA 59. He lodged no formal objection at that time. JA 59. The panel was seated, then the judge excused the last sixteen jurors to return to the central jury room, conducted some general voir dire, distributed questionnaires, and recessed the panel for lunch. VDR 4:1697-1777.

At that point, the State formally objected to the defense's shuffle, asking that the panel be either reshuffled or quashed; the prosecutors, in accordance with state law, essentially argued that when the State protested the manner in which defense counsel conducted his shuffle, the parties' agreement to conduct shuffles outside the courtroom terminated.[47] JA 57, 63. Defense counsel responded: "[W]hat this is really all about is that jurors number one, two, three, four and eight and fifteen on the first list were all black, that when they went down and shuffled the first time, the black jurors were number nineteen, twenty-six, thirty-six, thirty-seven, thirty-eight, and thirty-nine, that after the second shuffle those same six blacks are now one, two, three, four, seven, and fourteen. That's what this is all about." JA 61-62. But, as the prosecutor noted, he had voiced his complaint during the defense's shuffle, before he had even seen the array or knew in what order the venire members would be seated. JA 62. The trial judge denied the State's request to reshuffle or quash the panel, finding that the State had failed to object to the defense's shuffle in a timely manner. JA 64-65.

Any problems of improper shuffling were remedied during the fourth and fifth weeks of jury selection when the defense's shuffles were conducted under the trial judge's

[47] Texas law as it existed at the time of Miller-El's trial dictated that a shuffle conducted outside the courtroom without consent of the parties was not a valid shuffle under Article 35.11 of the Texas Code of Criminal Procedure. *Latham v. State*, 656 S.W.2d 478, 480 (Tex. Crim. App. 1983); *Stark v. State*, 657 S.W.2d 115, 116 (Tex. Crim. App. 1983).

supervision in his chambers.[48] VDR 6:2472, 9:3585-86. The record does not reflect the racial composition of these panels, but does show that of the fourteen prospective jurors examined during the fourth week, two were African-American; and of the fifteen prospective jurors examined during the fifth week, four were African-American, one was Filipino-American, and one was Latino.

II. THE *SWAIN* HEARING IN STATE COURT

On March 9, 1986—just four days after Miller-El's jury was empaneled—the *Dallas Morning News* ran a front-page story about jury selection practices in Dallas County criminal cases. JA 698. This article prompted defense counsel to file a motion to quash the jury panel based on this Court's opinion in *Swain v. Alabama*, 380 U.S. 202 (1965). The trial court held a hearing on the motion on March 12, 1986. JA 723.

A. Evidence admitted at the hearing

Former assistant district attorney John Sparling[49] testified regarding a paper on jury selection that he wrote in 1969 for a lecture he gave a small group of misdemeanor prosecutors, and which was ultimately included in a larger manual used to train misdemeanor prosecutors. Sparling testified that the manual was no longer circulated in 1986. JA 739-40. The paper, in its introduction, stated that it contained "one prosecutor's ideas on some things that need to [be said] to [the] panel, and some things to look for in a juror." JA 30. The paper advised that "[w]ho you select, and what you qualify the panel on will depend on the type of crime, the age, color and sex of the defendant. . . ." JA 30. It went on to state that

[48] The State declined shuffles during the fourth and fifth weeks.

[49] Sparling was a prosecutor in the Dallas County District Attorney's Office from 1968 to 1981.

"[y]ou are not looking for any member of a minority group which may subject him to oppression" because "[m]inority races almost always empathize with the [d]efendant."[50] JA 32; *see also* JA 742. At the hearing, Sparling testified further that he believed the underlying reasoning of the paper—that a prosecutor does not want anyone on the jury unless he believes they will convict—has not changed since 1969. JA 744. But according to Sparling, a great deal of the information contained in the paper was outdated in 1986, including the remarks about minority jurors.[51] JA 743, 748.

District Judge Jack Hampton[52] testified that as a misdemeanor prosecutor in Dallas County in 1958, he was once reprimanded by either the District Attorney or the First Assistant for allowing an African-American to serve as a juror in a misdemeanor DWI case after the juror held out and forced a mistrial.[53] JA 762. From that time until he left the District Attorney's Office in 1962, he never allowed another

[50] The paper also counseled against selecting older women who wear too much make-up because they are usually unstable, and extremely overweight people, especially young men and women, because they lack self-discipline and are sometimes unstable. JA 33.

[51] As Sparling explained, "Well, my attitude was that, in 1969, that there were certain, either groups of people that may either actually be, or perceive themselves as being oppressed by the state, being discriminated against. The thought being: If they were, in fact, discriminated against, and if they had, in fact, been oppressed by the state, normally they might take it out against the State. In 1969 things—our world has changed drastically since 1969. I don't need to tell you that. But there was a lot going on in 1969 that is not going on in 1981 or 1986." JA 744.

[52] Judge Hampton was a misdemeanor prosecutor in the Dallas County District Attorney's Office from 1957 to 1962. JA 758-59. He was in private criminal defense practice until he took the bench in 1981. JA 758.

[53] Judge Hampton denied that the person who reprimanded him used the term "nigger." JA 766. *See* Petitioner's Brief at 3 (quoting former Dallas County District Attorney Henry Wade as telling Hampton, "If you ever put another nigger on a jury, you're fired.").

African-American to sit on a jury unless he ran out of peremptory strikes. JA 760. Nonetheless, Judge Hampton testified that, even in 1962, it was not the policy of the District Attorney's Office to exclude people from juries solely because of their race. JA 763.

District Judge Larry Baraka,[54] an African-American, testified regarding an instance in 1985 when he reprimanded a prosecutor for what he believed to be discriminatory jury selection practices. JA 769. That prosecutor was not involved in jury selection in Miller-El's case. JA 768. Judge Baraka testified further that as an assistant district attorney from 1976 to 1978, he did see African-Americans on juries, but he tended to see more white jurors. JA 769-70. While he believed some individual prosecutors may have systematically excluded African-Americans from juries during that time, he did not believe it was the policy of the office to exclude African-Americans from juries. JA 772. When asked by defense counsel whether he believed prosecutors had engaged in systematic exclusion of African-Americans from juries, Judge Baraka responded, "I would say in the past, yes." JA 770. Finally, Judge Baraka testified that, to the best of his recollection, the training manual he received when he attended the training course for misdemeanor prosecutors in 1977 did not contain the paper written by John Sparling. JA 774.

Ralph Tait,[55] chief public defender in Dallas County, testified that, as a defense attorney, he "routinely warn[ed]

[54] Judge Baraka joined the Dallas County District Attorney's Office as a misdemeanor prosecutor in 1976. JA 768. In 1978, after being promoted to felony prosecutor, he left the District Attorney's Office and entered private criminal defense practice. He took the bench a little more than a year before Miller-El's trial. JA 768.

[55] Tait was a misdemeanor prosecutor with the Dallas County District Attorney's Office from 1966 to 1968. JA 776. He then entered private criminal defense practice in Dallas.

black clients that juries are widely composed of mostly white housewives and red-necks from the suburbs who have very little contact with them." JA 775. Tait testified, nonetheless, that he recalled no office policy of excluding African-Americans from juries when he served as a misdemeanor prosecutor in the District Attorney's Office from 1966 to 1968. JA 776. While "back then" some individual prosecutors thought it was important to exclude African-Americans from juries, it was not policy. JA 776.

District Judge Harold Entz[56] testified that, while a prosecutor in the District Attorney's Office from 1967 to 1969, he selected juries with African-Americans and he knew of no policy to exclude African-Americans from juries. JA 787. He testified further that, as a judge, he had once discovered that a prosecutor's request for a jury shuffle was prompted by the fact that there were numerous African-Americans toward the front of the panel. JA 788. That instance did not involve the prosecutors in Miller-El's trial. JA 789. Judge Entz also testified that the prosecutors in Miller-El's trial had tried cases in his court and he was aware of no instances in which they had systematically excluded minorities. JA 789.

District Judge Ed Kinkeade[57] testified that, in light of the *Dallas Morning News* article, he had proposed to other judges that they inform prosecutors at the outset of jury selection that exclusion of minority jurors solely for racial reasons would not be tolerated. JA 791. He already had a policy in place in his courtroom of requiring prosecutors to put on the record the reasons for their strikes of minority venire members if

[56] Judge Entz was a prosecutor with the Dallas County District Attorney's Office from 1967 to 1969. He entered private criminal defense practice, then took the bench in 1974. JA 786

[57] Judge Kinkeade was licensed in 1974 and took the bench in 1981. JA 790.

they did not question those venire members. JA 792. Judge Kinkeade also noted that, in his experience, only some prosecutors appeared to strike jurors based on race. JA 793.

Defense attorney John Stauffer[58] testified that while he was a prosecutor at the District Attorney's Office from 1964 to 1979, it was never the office's policy to exclude African-Americans or any other minority from juries based on race. JA 800. In fact, Stauffer testified that, as a prosecutor, he had tried cases with African-American jurors, including a capital case in 1970 or 1971, in which an African-American defendant was accused of killing a white person. JA 798. While this was not the first time an African-American had served as a juror in a capital case in Dallas County, Stauffer believed it was the first time an African-American juror sat in a capital case involving an African-American defendant and a white victim. JA 799. Stauffer, who was responsible for gathering materials for the training manual in 1969, testified that John Sparling's paper did not reflect the policy of the office; neither the manual as a whole, nor the Sparling paper in particular, were ever reviewed or endorsed by the District Attorney. JA 801-802. Rather, the paper represented the ideas of one prosecutor on how voir dire should be conducted. JA 800. According to Stauffer, Sparling's paper remained in the manual until 1976, when the Texas District and County Attorneys Association took over the task of distributing it. JA 804. He did not recall whether the Sparling paper remained in the manual after that. JA 804.

At the conclusion of the hearing, the trial judge found that there was no evidence presented indicating any systematic exclusion of African-Americans as a matter of policy by the District Attorney's Office and that Miller-El had failed to establish a *Swain* violation.

[58] Stauffer had been a prosecutor in the Dallas County District Attorney's Office from 1967 to 1979. He then entered private criminal defense practice. JA 795.

B. Evidence not before the trial judge

The *Dallas Morning News* articles, and the statistics they contained, upon which Miller-El now relies,[59] were not admitted into evidence at the *Swain* hearing. Rather, the trial judge excluded them as hearsay.[60] JA 809. The trial judge had granted the newspaper's motion to quash subpoenas issued to its reporters on First Amendment grounds. JA 723-25, 806. This ruling prompted defense counsel to request that he be allowed to make an offer of proof of the newspaper articles, which the trial court allowed. JA 806. Defense counsel further requested that the record be held open to allow his investigator an opportunity to duplicate the statistical analyses conducted by the *Dallas Morning News* reporters. JA 808. The judge granted the request, but noted that the State would be given an opportunity to rebut any information the defense was able to amass. JA 808. Miller-El never presented additional evidence.[61]

Also not before the trial court were two state court opinions reversing convictions based on *Batson*.[62] *See* Petitioner's Brief at 5. These opinions, which were issued in 1989 and 1990, were clearly not before the trial court either at the *Swain* hearing in 1986 or at the *Batson* hearing in 1988.

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[59] *See* Petitioner's Brief at 4-5.

[60] The only portions of the articles admitted into evidence were excerpts quoting John Sparling, who testified at the hearing, utilized by defense counsel during his examination of Sparling. JA 753-754. As the prosecution objected, "[W]e are not about to agree that the newspapers article is probative evidence of anything." JA 809.

[61] Miller-El refers to the statistical data contained in the newspaper articles as "uncontested." Petitioner's Brief at 45. But the record shows clearly that the reason the data was never disputed by the State at trial was because it was never admitted.

[62] *Chambers v. State*, 784 S.W.2d 29 (Tex. Crim. App. 1989); *(Dorothy) Miller-El v. State*, 790 S.W.2d 351 (Tex. App.—Dallas 1990).

Finally, also not before the trial court was a 1963 treatise on jury selection relied upon by Miller-El. *See* Petitioner's Brief at 3-4.

III. THE *BATSON* CLAIM IN STATE COURT

The case proceeded to trial and Miller-El was convicted of capital murder on March 26, 1986. One month later, this Court issued its opinion in *Batson*.

On direct appeal, Miller-El challenged his jury selection under the *Batson* standard. The Texas Court of Criminal Appeals found that Miller-El had established a prima facie claim under *Batson's* first step based on the disproportionate number of African-Americans stricken. *Miller-El v. State*, 748 S.W.2d 459, 460 (Tex. Crim. App. 1988). The case was remanded to the trial court with instructions to conduct a *Batson* hearing. *Id.* at 460-61.

At the *Batson* hearing, conducted on May 10, 1988, the defense relied on the evidence it had presented at the *Swain* hearing without offering any trial-related evidence more applicable in a *Batson* context.[63] JA 840. The State objected to its admission, arguing that the evidence was irrelevant under *Batson* since it did not bear on the prosecutor's conduct in Miller-El's case. JA 842. The court overruled the State's objection, however, and admitted the evidence, commenting that "[w]hat weight, if any, I will give it, I certainly reserve for myself." JA 843. Prosecutor Paul Macaluso testified regarding his reasons for striking venire members Paul Bailey and Joe Warren, for whom no reasons had been given at

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[63] Miller-El did not advance his disparate treatment and disparate questioning arguments until federal habeas corpus proceedings. Nonetheless, the trial court specifically found, based on its own recollections and on its review of the entire voir dire record, that the prosecutors did not engage in disparate treatment or disparate questioning based on race. *See* JA 878.

trial,[64] and the State asked the court to take judicial notice of the explanations given during voir dire for its strikes of the remaining venire members. JA 866. Thereafter, the court issued written findings, determining that the prosecution's explanations were race-neutral and negated any inference of purposeful discrimination. JA 873-878.

Miller-El challenged these findings on direct appeal. The Texas Court of Criminal Appeals, after independently reviewing the voir dire and the supplemental record, found that the record contained "ample support" for the prosecutor's racially neutral reasons and concluded that the prosecutor's explanations were not "patently implausible or so contrary to the evidence as to be unworthy of belief as a matter of law." JA 881.

IV. FEDERAL HABEAS PROCEEDINGS

Miller-El advanced his *Batson* claim again in his federal habeas petition. A United States magistrate judge recommended denying habeas corpus relief, concluding that the record supported the trial judge's finding that Miller-El had failed to prove purposeful discrimination. JA 920. After conducting a de novo review of the magistrate's disposition and hearing arguments from counsel, the district judge denied relief based on the magistrate's findings and recommendation. JA 942. The United States Court of Appeals for the Fifth Circuit denied Miller-El's request for a certificate of appealability, concluding, in light of the presumptively correct state court finding of no purposeful discrimination, "that this issue would not be debatable among jurists of reason, that courts could not resolve the issues in a different manner, and that the issue does not deserve encouragement to proceed further." JA 961.

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[64] Defense counsel had failed to object to the State's exercise of peremptory strikes against Bailey and Warren at the time of the strikes; therefore, the State had not offered race-neutral reasons.

SUMMARY OF THE ARGUMENT

Miller-El has failed to overcome the trial judge's finding that prosecutors did not discriminate against African-American venire members based on race. The trial judge, who observed firsthand the entire jury selection process, including the demeanor of the prosecutors and prospective jurors, credited the prosecutors' race-neutral, case-related reasons for striking African-American venire members, and the record fully supports that credibility determination. Each African-American peremptorily challenged by the State had voiced views unfavorable to the State. Furthermore, the record reflects that prosecutors treated similarly situated venire members equally, examining them based on their individual views and circumstances, not based on their race. Finally, the trial judge was certainly entitled to determine that Miller-El's evidence of historical discrimination in Dallas County was simply not sufficient to overcome the evidence in this case that prosecutors struck prospective jurors, not because of their race, but because of their unfavorable case-related views.

Additionally, the court of appeals applied the correct standard in determining that Miller-El failed to make a substantial showing of the denial of a constitutional right and, thus, that he was not entitled to a certificate of appealability. The court of appeals' opinion properly analyzed the merits of Miller-El's claim, in light of the applicable standard of review, and determined that the issue would not be debatable among jurists of reason and that courts could not resolve the issue in a different manner.

Finally, the lower court's consolidation of subsections (d)(2) and (e)(1) was entirely permissible in this case. The lower federal courts agree that the inquiries of these two subsections, both of which govern federal courts' review of state court factual determinations, are necessarily intertwined, and the provisions must be read in conjunction with one

another. It was unnecessary to accord these subsections independent treatment when resolution of Miller-El's *Batson* claim hinged on a single state court fact finding.

ARGUMENT

I. MILLER-EL HAS FAILED TO SHOW THAT THE STATE COURTS' REJECTION OF HIS *BATSON* CLAIM IS UNREASONABLE.

A. A trial judge's finding at *Batson*'s third step is entitled to great deference.

Batson v. Kentucky introduced a three-step evidentiary framework for evaluating claims of racial discrimination in jury selection. 476 U.S. at 96-98. First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. *Id.* at 96-97. Second, if the requisite showing has been made, the burden shifts to the prosecutor to provide a race-neutral explanation for striking the venire member in question.[65] *Id.* at 97-98. Third, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. *Id.* at 98. Under *Batson*, the ultimate burden of persuading the court that the State's peremptory challenges are attributable to a discriminatory purpose lies with and never shifts from the defendant. 476 U.S. at 94 n.18 (citing *Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981)); *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

In this case, there is no dispute that Miller-El presented a prima facie claim under *Batson*'s first step. Nor is there any dispute that the prosecution presented facially race-neutral

[65] To satisfy the second part of the three-step analysis, the prosecutor need only give an explanation based on something other than race. *Hernandez v. New York*, 500 U.S. 352, 359 (1991). "Unless discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* Moreover, the reason offered need not rise to the level of a challenge for cause. *Batson*, 476 U.S. at 97.

reasons for exercising each peremptory challenge. Solely at issue is Miller-El's disagreement with the trial court's ultimate determination at *Batson*'s third step that the prosecutors' reasons were credible and that no purposeful discrimination occurred. Miller-El has failed to overcome that determination.

A trial judge's factual finding at *Batson*'s third step is necessarily accorded great deference on appellate review. Even on direct review, a reviewing court may overturn a state trial court's finding on the issue of discriminatory intent only if it is convinced that the determination was clearly erroneous. *Hernandez v. New York*, 500 U.S. 352, 369 (1991) (plurality); *see also id.* at 372 (O'Connor, J., joined by Scalia, J., concurring) (agreeing with plurality that Court reviews for clear error trial court's finding as to discriminatory intent). And where, as here, the claim is before the Court on federal habeas review, the trial judge's determination must be upheld unless it is unreasonable. 28 U.S.C. § 2254(d)(2).

The deferential treatment of the trial judge's determination is grounded in the obvious advantage he has over reviewing courts in assessing the facts. He has witnessed the entire jury selection process as it has unfolded, in this case over the expanse of more than a month. He has had the unique advantage of observing the demeanor of both prosecutors and prospective jurors. Indeed, in the *Batson* context, the trial judge is essentially a witness to the very conduct alleged to be discriminatory. The credibility of the prosecutor is the deciding factor in a *Batson* claim, *Batson*, 476 U.S. at 98 n.21, and "evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within the trial judge's province.'" *Hernandez*, 500 U.S. at 365 (quoting *Wainwright v. Witt*, 469 U.S. 412, 428 (1985)). Equally critical to the trial judge's appraisal of the prosecutors' credibility is the trial judge's observations of venire members. "The manner of the juror while testifying is oftentimes more

indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record." *Patton v. Yount*, 467 U.S. 1025, 1037 (1984) (citation and quotation omitted). Thus, a trial judge's ability to witness prospective jurors' "[d]emeanor, inflection, [and] the flow of the questions and answers" places him in the best position to gauge whether the prosecutors' reasons for striking particular jurors were credible or pretextual. *Id.* at 1038 n.14.

From this superior vantage point, the trial judge in this case found that the prosecutors did not discriminate against African-American venire members; that none of the explanations given by the prosecutors were based on race; that none of the prospective jurors were questioned perfunctorily; that there was no disparate examination of prospective jurors; and that the reasons given for the prosecutors' peremptory challenges were closely and directly related to the facts of the case. JA 877-78. These findings are abundantly supported by the record of voir dire proceedings in this case.

B. The trial judge's finding of no purposeful discrimination is amply supported by the voir dire record.

Throughout jury selection in this case, prosecutors followed a consistent voir dire strategy of identifying and removing prospective jurors who expressed opposition to or hesitancy about the death penalty. This strategy motivated the prosecutors' questioning of prospective jurors, their pursuit of for-cause challenges, and their exercise of peremptory challenges.

It was the divergence of views of minority versus non-minority venire members, rather than any impermissible discriminatory purpose, that resulted in the racial disparity in the State's exercise of its peremptory strikes. Of the venire members called for jury service in this case, more than seventy percent of non-minority venire members had no

qualms about either the death penalty generally or their willingness to assess it in an appropriate case. *See supra* at 9. Conversely, only two of fifteen African-American venire members expressed no qualms about the death penalty. *See supra* at 10.

Plainly, the mere fact that the impact of the State's legitimate voir dire strategy bore more heavily on African-American venire members does not prove purposeful discrimination. In addressing a *Batson* claim, a reviewing court "must keep in mind the fundamental principle that 'official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.'" *Hernandez*, 500 U.S. at 359-360 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-265 (1977)). *See also McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) ("[A] defendant who alleges an equal protection violation has the burden of proving the existence of purposeful discrimination.").

Here, the prosecutor struck jurors who had expressed views unfavorable to the State, regardless of their race. In light of the divergence of views between minority and non-minority venire members, the bare racial disparity of the prosecutors' strikes lends little support to Miller-El's claim of purposeful discrimination. *See Easley v. Cromartie*, 532 U.S. 234, 243, 258 (2001) (reversing finding of equal protection violation in redistricting plan where evidence showed high correlation between racial identification and political affiliation); *Bush v. Vera*, 517 U.S. 952, 968 (1996) (O'Connor, J., principal opinion) ("If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify.").

All but one of the challenged venire members expressed ambivalence or hesitance about the death penalty either in their juror questionnaires or during their voir dire examinations; in many instances, there were additional considerations that informed the State's strikes, such as pro-defense views on rehabilitation and the criminal histories of family members. *See supra* at 2-9. The one challenged venire member who had expressed no qualms about the death penalty had expressed pro-defense views regarding rehabilitation and had a brother with an extensive criminal history in Dallas County. *See supra* at 4-5.

Furthermore, that some of the venire members who expressed hesitancy about assessing a death sentence later claimed they would be able to assess the death penalty does not render the prosecutors' strikes illegitimate. While these affirmations effectively insulated them from a challenge for cause, a prosecutor's explanation "need not rise to the level justifying exercise of a challenge for cause." *Batson*, 476 U.S. at 97. A prosecutor is certainly allowed to conclude that a prospective juror's initial indecision may not bode well for the State. *See Caldwell v. Maloney*, 159 F.3d 639, 655-56 (1st Cir. 1998) ("[T]he prosecutor had no obligation either to ignore [the prospective juror's comments about her reluctance] or to accept at face value [the prospective juror's] prediction that, in the end, [she] could put aside [her] problem and do it right.").

Significantly, Miller-El's argument that the State treated similarly situated white venire members differently is not borne out by the evidence. These kinds of subjective considerations are not easily assessed from a cold record. "The attributes relied upon by the prosecutor in striking potential jurors are not always easily compared. . . ." *United States v. Alston*, 895 F.2d 1362, 1367 n.5 (11th Cir. 1990). Disparate treatment cannot be imputed in every situation where the State rejects one venire member with the same characteristics as another venire member who is accepted.

Indeed, the decision to strike a particular panelist "may be influenced by intuitive assumptions that are not fatally suspect merely because they are not quantifiable." *United States v. Lance*, 853 F.2d 1177, 1181 (5th Cir. 1988). *See also Matthews v. Evatt*, 105 F.3d 907, 918 (4th Cir. 1997) (noting that both prosecutor and defense counsel must be allowed to make credibility determinations when exercising peremptory challenges). But even on a cold record, it is clear that the State approached similarly situated venire members on equal grounds based on their individual views and circumstances, and not based on race.

Miller-El's attempt to impute discriminatory intent to the prosecutors from their use of particular jury selection tactics is equally unavailing. The fact that African-Americans were subjected to certain lines of questioning in disproportionate numbers is simply a function of the divergence of views between the African-American panelists and the non-minority panelists. Prosecutors utilized the legitimate tactic of disparate questioning to identify and remove prospective jurors who had expressed views unfavorable to the State.

Similarly, Miller-El overstates the significance of the State's requests for jury shuffles and mischaracterizes the record in an attempt to portray the State as scheming to manipulate the jury shuffle process. He ignores the fact that the heart of the State's complaint to the defense's shuffle during the third week of jury selection was that defense counsel failed to shuffle the juror cards thoroughly. *See supra* at 21-22. And he completely omits the fact that prosecutors voiced their complaint to the shuffle before they were even aware of the racial composition of the newly shuffled venire. *See supra* at 22. In any event, any inference that can be drawn from such evidence cannot overcome the highly persuasive race-neutral explanations for the State's strikes, explanations which are supported by the record and were credited by the trial judge.

The voir dire record in this case clearly supports the finding of the trial judge that prosecutors did not exercise peremptory strikes based on race.

C. The trial judge considered all relevant evidence properly before him and determined reasonably that Miller-El failed to prove purposeful discrimination.

Miller-El argues that the trial judge failed to "take proper account" of all relevant evidence in evaluating his *Batson* claim, specifically his pattern and practice evidence. Petitioner's Brief at 42. The cases cited by Miller-El, however, do not require a fact-finder to accord any particular degree of weight, or any weight for that matter, to any type of circumstantial evidence. Rather, these cases simply counsel that all relevant evidence should be considered and that a fact-finder *may* rely upon any relevant circumstantial evidence to arrive at a determination that purposeful discrimination occurred, all the while reaffirming the ultimate principle of deference to the fact-finder. For example, in *Hernandez v. New York*, Justice O'Connor noted in her concurrence that

> [d]isproportionate [strikes of African-American venire members] *may*, of course, constitute evidence of intentional discrimination. The trial court *may*, because of such effect, disbelieve the prosecutor and find that the asserted justification is merely a pretext for intentional race-based discrimination. But if, as in this case, the trial court believes the prosecutor's nonracial justification, and that finding is not clearly erroneous, that is the end of the matter.

500 U.S. at 375 (O'Connor, J., concurring in judgment) (citation omitted; emphases added). Likewise, in *Reeves v. Sanderson Plumbing Product, Inc.*, in which the Court reversed the intermediate appellate court's reversal of the

jury's and trial judge's finding of purposeful discrimination, the Court held that

> [a]lthough the presumption of discrimination [created by the prima facie case] drops out of the picture once the defendant meets its burden . . . , the trier of fact *may* still consider the evidence establishing the plaintiff's prima facie case and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual.

530 U.S. 133, 143 (2000) (internal quotations omitted; emphasis added).

Moreover, much of the evidence Miller-El now relies on was not even before the trial judge, most notably the statistical data contained in the *Dallas Morning News* articles.[66] *See supra* at 28-29. Clearly, this Court's review is limited to discerning whether the trial judge's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

But even if this evidence were properly before the trial court, it would not impeach the trial judge's decision. In the face of the race-neutral, case-related reasons for the prosecutors' strikes in this case, the statistical data simply is not sufficient to trump the trial judge's credibility assessments. Miller-El's reliance on the opinions in *Chambers* and *(Dorothy) Miller-El* is also futile. Any inference that may be

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[66] Also not before the trial court were two state court opinions reversing convictions based on *Batson*, *see* Petitioner's Brief at 5 (citing *Chambers v. State*, 784 S.W.2d 29 (Tex. Crim. App. 1989); *(Dorothy) Miller-El v. State*, 790 S.W.2d 351 (Tex. App.—Dallas 1990); a recitation of testimony given in another case, upon which Miller-El relies as proof that the training manual still contained the Sparling paper in 1980, *see* Petitioner's Brief at 4 (citing *Ex parte Haliburton*, 755 S.W.2d 131, 133 n.4 (Tex. Crim. App. 1988)); and a 1963 treatise on jury selection relied upon by Miller-El. *See* Petitioner's Brief at 3-4.

drawn from the mere fact that a prosecutor was involved in a single case, among hundreds he tried, that was reversed under *Batson* is insufficient to overcome the trial judge's finding that the State did not discriminate in this case. But in any event, to the extent these opinions indicate that these prosecutors discriminated against African-Americans in another case,[67] the opinions do little to prove that they did likewise in Miller-El's case, particularly in light of the undisputed race-neutral, case-related reasons for the strikes in this case. Additionally, evidence presented in another case that the training manual still contained the Sparling paper in 1980 is in conflict with testimony presented in Miller-El's case that the paper was removed from the manual in 1976. *See* JA 774 (Judge Baraka's testimony). In any event, the paper was no longer in the manual in 1986. *See* JA 741 (Sparling's testimony).

The record belies Miller-El's contention that the trial judge failed to consider all the evidence properly before him, including the pattern and practice evidence admitted at the *Swain* hearing. JA 844. At the *Batson* hearing, the trial judge admitted into evidence, over the State's objection on relevancy grounds, the Sparling paper and all the testimony regarding historical jury selection practices in Dallas County originally admitted at the *Swain* hearing.[68] JA 843. The trial

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[67] It should be noted, however, that in *Chambers*, prosecutor Paul Macaluso was found responsible for striking only one of three African-Americans struck by the State. 784 S.W.2d at 31-32. Likewise, the opinion in *(Dorothy) Miller-El* cited by Miller-El does not even reflect that Jim Nelson was involved in the case. 790 S.W.2d at 354-356. The record of that trial indicates that Nelson was lead prosecutor at Dorothy Miller-El's trial, but another prosecutor, Bruce Isaacks, was responsible for jury selection.

[68] Miller-El argues in a footnote that "[t]he state courts' failure to consider petitioner's pattern and practice evidence during the third stage of the *Batson* analysis constituted an independent violation of 28 U.S.C. § 2254(d)(1)." Petitioner's Brief at 45, n.36. This alternative argument—

judge apparently determined nonetheless (as he was certainly entitled to do) that such circumstantial evidence of discriminatory intent, which had no direct bearing on the actions of prosecutors in this case, was insufficient to prove purposeful discrimination in the face of the race-neutral, case-related reasons for the prosecutors' strikes documented abundantly by the record.

If accepted, Miller-El's submission would shift the burden of proof to the State to overcome all available circumstantial evidence of discrimination.[69] But under *Batson*, the ultimate burden of persuading the court that the State's peremptory challenges are attributable to a discriminatory purpose lies with and never shifts from the defendant. 476 U.S. at 94 n.18 (citing *Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. at 252-56); *Purkett v. Elem*, 514 U.S. at 768. Because Miller-El failed to satisfy his burden of proving discriminatory purpose, the trial judge found that the prosecutors did not act with discriminatory purpose. That determination is not unreasonable in light of the record, and Miller-El is not entitled to habeas relief.

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which, interestingly, played more predominantly in Miller-El's certiorari petition—is unsupported by the record. The trial judge clearly admitted the pattern and practice evidence over the State's objection on relevancy grounds. *See supra* at 29. The mere fact that the trial judge did not specifically mention this evidence in his written findings is not a sufficient basis to assume that the trial judge did not consider the evidence.

[69] *See, e.g.*, Petitioner's Brief at 40-41 ("only if the purportedly race-neutral explanations for the conduct in question *outweigh* the totality of evidence supporting a finding of discrimination can a court reject a claim of purposeful discrimination") (emphasis added); *id.* at 43 ("If such a disparity is to be *successfully defended* . . . the State's proffered explanation must be sufficiently persuasive to survive all the evidence tending to demonstrate that it engaged in purposeful discrimination. . . .") (emphasis added; citation and quotation omitted).

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT MILLER-EL WAS NOT ENTITLED TO A CERTIFICATE OF APPEALABILITY BASED ON HIS *BATSON* CLAIM.

Miller-El claims that the lower court erred in denying a certificate of appealability ("COA") because the court of appeals applied an incorrect standard in determining that Miller-El was not entitled to a COA, and because the court of appeals misinterpreted the provisions of 28 U.S.C. § 2254 to hold him to a higher burden of proof than that contemplated by the statute. Neither of the arguments is supported by the statute. But in any event, these issues are inconsequential to the resolution of Miller-El's claim. Miller-El is not entitled to relief under any permissible interpretation of the statute. And even if this Court were to conclude that Miller-El is entitled to a COA, it can, and should, affirm the denial of habeas corpus relief nonetheless.

A. The court of appeals correctly applied the certificate of appealability standard.

1. *The court below recited and applied* Slack.

Miller-El argues that the lower court erred by basing its denial of a COA on its own subjective finding that the underlying *Batson* claim lacked merit, in contravention of 28 U.S.C. § 2253. Petitioner's Brief at 32. A fair reading of the lower court's opinion refutes this assertion.

At the outset of its analysis of Miller-El's COA request, the court set out the proper standard for granting a COA:

> Under AEDPA, before an appeal from the dismissal or denial of a § 2254 habeas petition can proceed, the petitioner must first obtain a COA, which will issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The same standards that governed issuance of the pre-AEDPA version of the COA, the certificate of probable cause ("CPC"), apply to requests for a COA. *See Slack v. McDaniel*, 529 U.S. 473 [] (2000). A petitioner makes a "substantial showing" when he demonstrates that his petition involves issues which are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are adequate to deserve encouragement to proceed further. *See id.* at [483-484].

JA 955-56. The court went on to review the merits of Miller-El's *Batson* claim in light of the presumptively correct state court finding that the prosecutors did not exercise peremptory challenges in a racially discriminatory manner, as well as the deferential standard of review mandated by 28 U.S.C. § 2254, and concluded "that this issue would not be debatable among jurists of reason, that courts could not resolve the issues in a different manner, and that the issue does not deserve encouragement to proceed further. Miller-El has thus failed to make a substantial showing of the denial of a constitutional right." JA 961.

Thus, the court clearly enunciated and applied the correct standard in determining that resolution of Miller-El's *Batson* claim was not debatable among jurists of reason in light of its review of the record and the great deference owed to the trial judge's finding that prosecutors did not discriminate against African-American prospective jurors. Miller-El seems merely to quibble with the breadth of the lower court's analysis.[70]

Miller-El theorizes that under the Fifth Circuit's formulation of the COA analysis, "only those habeas petitioners

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[70] Moreover, contrary to Miller-El's assertions, *see* Petitioner's Brief at 34 n.27, the court of appeals took into account this Court's admonition that "the nature of the penalty is properly considered in determining whether to issue a [COA], but the severity of the penalty does not in itself suffice to warrant the automatic issung of a certificate." *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). *See* JA 956.

who ultimately prevail on appeal would be allowed to pursue an appeal in the first place, and the COA process would be converted, paradoxically, into the appeal itself." Petitioner's Brief at 34. However, in numerous cases, the Fifth Circuit has reviewed the merits of the underlying claim on which a petitioner's COA request was based, determined that a petitioner was entitled to a COA, then ultimately affirmed the district court's denial of relief, all in a single opinion. *See Foster v. Johnson*, 293 F.3d 766, 2002 WL 1233208 (5th Cir. June 6, 2002); *Robison v. Johnson*, 151 F.3d 256 (5th Cir. 1998); *Fuller v. Johnson*, 114 F.3d 491 (5th Cir. 1997); *Mata v. Johnson*, 99 F.3d 1261 (5th Cir. 1996) (overruled on other grounds); *Drinkard v. Johnson*, 97 F.3d 751 (5th Cir. 1996) (overruled on other grounds).

The court of appeals applied the correct COA standard and determined, based on the fully supported state court findings and in light of the governing standard of review, that Miller-El was not entitled to a COA.

2. *The lower court's COA analysis was consistent with the precedent of this Court and the vast majority of federal circuit courts.*

Miller-El argues alternatively that the court of appeals erred when it took into account the deferential standard of review contained in 28 U.S.C. § 2254 in assessing whether Miller-El was entitled to a COA under § 2253(c). *See* Petitioner's Brief at 34 n. 29. He suggests that, in determining whether a COA should issue, a court should assess the merits of the constitutional issue in the abstract, rather than in the context of the limited nature of habeas corpus review. However, precedent from this Court and the overwhelming majority of federal circuits counsels against Miller-El's proposed approach, and the cases upon which Miller-El relies to support his contrary theory simply do not stand for the proposition for which they are cited.

Where the "district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find *the district court's assessment of the constitutional claims debatable or wrong*." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (emphasis added). In *Slack*, this Court recognized that the COA inquiry asks whether the district court erred in denying habeas corpus relief, and not necessarily whether the underlying constitutional claim has merit. *Id.* at 484-485. The Court held that, where a federal court's dismissal of a petition is based on procedural grounds, the petitioner has a two-part burden to satisfy to establish entitlement to a COA: first, he must demonstrate that reasonable jurists could disagree regarding the court's procedural ruling; and second, he must show that reasonable jurists could find he was entitled to relief based on his underlying claim. *Id.* Thus, a court may deny a COA based merely on its determination that no reasonable jurist could differ with a district court's dismissal of a petition on procedural grounds, without even taking into account the merits of the underlying constitutional claim. *Id.* at 484. The Court recognized the reality that an appeal is not warranted, and thus no COA should issue, when it is indisputable that the district court correctly denied relief, whether based on procedure or substance. *Id.*

Just as the doctrine of procedural default imposes a barrier on the granting of habeas corpus relief, § 2254 "place[s] a [] restriction on the power of federal courts to grant writs of habeas corpus to state prisoners." *Williams v. Taylor*, 529 U.S. 362, 399 (2000). Thus, the rationale of *Slack* extends logically and necessarily to require that the COA inquiry account for the fact that the district court considers the claim, not in the abstract, but through the filter of the AEDPA's deferential scheme.

The federal circuit courts overwhelmingly follow this Court's logic in *Slack*, factoring the applicable standard of

review into the COA analysis. *See McWee v. Weldon*, 283 F.3d 179, 182 (4th Cir. 2002); *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000); *Hill v. Johnson*, 210 F.3d 481, 484-85 (5th Cir. 2000); *Dowthitt v. Johnson*, 230 F.3d 733 (5th Cir. 2000); *Wheat v. Johnson*, 238 F.3d 357 (5th Cir. 2001); *Cooey v. Coyle*, 289 F.3d 882, 897 (6th Cir. 2002); *Coleman v. Ryan*, 196 F.3d 793, 799-800 (7th Cir. 1999); *Nevius v. McDaniel*, 218 F.3d 940, 948 (9th Cir. 2000); *Johnson v. Hargett*, 229 F.3d 1163, 2000 WL 1093227, *2 (10th Cir. 2000) (unpublished); *see also Ramer v. Maxwell*, 2001 WL 55519 (10th Cir. 2001) (unpublished).

Miller-El fails to acknowledge this contrary authority and argues in support of his claim that "a number of courts of appeals have taken [his suggested] approach." Petitioner's Brief at 34-35 n.29 (citing *Cooey v. Coyle*, 289 F.3d 882 (6th Cir. 2002), *Coady v. Vaughn*, 251 F.3d 480 (3rd Cir. 2001), and *Shayesteh v. City of South Salt Lake*, 217 F.3d 1281 (10th Cir. 2000)). However, the cases he cites do not support his position. For example, Miller-El ignores the appendix to the Sixth Circuit's opinion in *Cooey*, which clearly states the opposite. *Cooey v. Coyle*, 289 F.3d at 897 (assuming that inquiry under § 2253(c) must take into account § 2254 (d) and (e)(1)).

Miller-El's reliance on *Coady* and *Shayesteh* is also unavailing, but for different reasons. First, neither case involved a federal court's review of a state court adjudication, and thus § 2254's standard of review was not even at issue. *Coady* dealt with the denial of a parole claim by a local parole board, which was not a state court adjudication and thus not entitled to deference under § 2254. 251 F.3d at 483. Similarly, in *Shayesteh*, the state courts had refused to adjudicate the petitioner's claim on the merits due to their application of an independent and adequate state procedural rule, which the federal district court had found barred federal review based on the procedural default doctrine. 217 F.3d at 1283-84.

Therefore, the deferential scheme of § 2254 had no bearing in either case. Second, to the extent that the courts of appeals addressed the COA issue before addressing the threshold doctrines of exhaustion and procedural default, they ran afoul of this Court's opinion in *Slack*.

The Fifth Circuit's COA analysis was correct and consistent with the precedent of this Court and the vast majority of other federal circuit courts.

B. The court of appeals correctly interpreted and applied 28 U.S.C. § 2254 to Miller-El's *Batson* claim.

Miller-El attacks the lower court's application of 28 U.S.C. § 2254 to his *Batson* claim, alleging that it erred in fusing the requirements of subsections (d)(2) and (e)(1), which govern federal courts' review of state court factual determinations. But where, as here, a single factual determination is dispositive of the constitutional claim, the lower court's approach was correct and mandated by logic.

Section 2254(d)(2) prohibits the granting of federal habeas corpus relief unless the state court adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d)(2). Section 2254(e)(1) further provides that "a determination of a factual issue made by a State court shall be presumed to be correct" unless rebutted by the petitioner "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). These two provisions, while distinct, are necessarily intertwined and interdependent. The distinction so touted by Miller-El is further obscured, legitimately, in a case that does not involve multiple factual and legal determinations.

Given that the lower court's consideration of Miller-El's *Batson* claim essentially hinged on a single state court fact finding, it was entirely proper for the court of appeals to

aggregate its § 2254 analysis. Contrary to Miller-El's assertions, this formulation did not impermissibly heighten the standard of review. There is simply no meaningful difference between (1) requiring Miller-El to rebut the state court's finding of no purposeful discrimination by clear and convincing evidence, then demonstrate that same finding was unreasonable in light of the evidence presented, and (2) requiring him to demonstrate that the finding was unreasonable by clear and convincing evidence. The lower court merely took a practical approach to resolving Miller-El's claim, employing a permissible synthesis of two interrelated provisions.

Miller-El argues that the Fifth Circuit's approach does not accord independent significance to subsections (d)(2) and (e)(1). This is untrue. As the Fifth Circuit stated recently in *Valdez v. Cockrell*:

> [A] district court may find by clear and convincing evidence that the state court erred with respect to a particular finding of fact, thus rebutting the presumption of correctness with respect to that fact. See § 2254(e)(1). It is then a separate question whether the state court's determination of facts was unreasonable in light of the evidence presented in the state court proceeding. See § 2254(d)(2). Thus, it is possible that, while the state court erred with respect to one factual finding under § 2254(e)(1), its determination of facts resulting in its decision in the case was reasonable under § 2254(d)(2).

274 F.3d 941, 951 n.17 (5th Cir. 2001). Thus, the court of appeals has recognized the distinction between the two provisions when that distinction is critical to resolution of the claims presented. But this two-tiered analysis is simply unnecessary when the court reviews a claim whose resolution depends on a single factual determination. In Miller-El's case, it was simply not incumbent on the court of appeals to address the provisions separately.

The Fifth Circuit's approach is supported by the majority of federal circuits, which have consistently recognized that subsections (d)(2) and (e)(1), while distinct, are necessarily intertwined and interdependent. *See, e.g., Sanna v. Paolo*, 265 F.3d 1, 7 (1st Cir. 2001) (noting that (d)(2) and (e)(1) must be interpreted in conjunction with one another); *Young v. Catoe*, 205 F.3d 750, 756 n.3 (4th Cir. 2000) (holding that federal habeas court must accept state court factual finding that is "not unreasonable, *see* 28 U.S.C. § 2254(d)(2), and has not been rebutted by clear and convincing evidence, *see* 28 U.S.C. § 2254(e)(1) . . . ."); *Torres v. Prunty*, 223 F.3d 1103, 1110 n.6 (9th Cir. 2000) (recognizing that when federal habeas court decides "that the state court's factual determinations were unreasonable within the meaning of § 2254(d)(2), [it has] decided, of necessity, that on the existing record [the petitioner] has rebutted the 'presumption of correctness' of those findings by 'clear and convincing evidence.' *See* § 2254(e)(1)."); *Johnston v. Luebbers*, 288 F.3d 1048, 1055 (8th Cir. 2002) ("We conclude that Johnston has not met his burden of showing by clear and convincing evidence that the Missouri Supreme Court's factual determination on this issue was unreasonable").

This interplay is particularly crucial in the *Batson* context where a single factual determination is dispositive of the claim. *Weaver v. Bowersox*, 241 F.3d 1024, 1030-31 (8th Cir. 2001) (reversing district court's grant of habeas relief on *Batson*, holding that because petitioner had not rebutted state trial court's factual findings, court could not conclude that court's decision was unreasonable); *Sallahdin v. Gibson*, 275 F.3d 1211 (10th Cir. 2002) (affirming denial of *Batson* claim based on petitioner's failure to rebut state trial court's finding under § 2254(e)(1), without any discussion of whether finding was "unreasonable" under (d)(2)); *Gattis v. Snyder*, 278 F.3d 222, 235 (3rd Cir. 2002)(affirming district court's

denial of *Batson* claim, concluding that petitioner's failure to surmount (e)(1)'s presumption of correctness was fatal to his argument that state courts unreasonably applied federal law).

The court of appeals' interpretation and application of § 2254 were permissible and supported by the majority of federal circuits.

CONCLUSION

The trial judge properly credited the prosecutors' race-neutral, case-related reasons and held that Miller-El had failed to prove purposeful discrimination. If the Court accepts the proposition that the type of pattern and practice evidence on which Miller-El relies trumps a trial court's credibility evaluations in this case, then it necessarily would do so in every case tried within a particular time frame or by a particular prosecutor. This approach guts both the presumption of correctness and the even more fundamental rule that an appellate court cannot second-guess a trial court's credibility choices.

For the foregoing reasons, this Court should affirm the judgment of the court of appeals.

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IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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The record demonstrates that petitioner is entitled not only to a certificate of appealability but, more importantly, to relief on the merits. Respondent contends that the gross racial disparity in the State's peremptory strikes—which excluded 10 of the 11 qualified African-Americans—merely reflected disparate views on the death penalty between whites and blacks. But that argument—perilously redolent of the kind of race-based assumptions condemned in *Batson*—is refuted, not supported, by the record. Viewed against the backdrop of "appalling" racial discrimination in the Dallas County D.A.'s office, the conclusion that the State's proffered race-neutral justifications are pretextual is inescapable.

I. THE STATE'S STRIKES CANNOT BE EXPLAINED BY ITS PROFFERED REASONS.

A. The State's Purported Justifications For Striking African-Americans Apply Equally To Whites Who Were Not Struck.

The State admits disparate treatment of African-American and white veniremembers in numerous respects, including patterns of questioning (Br. 19-20, 35) and peremptory strikes (Br. 9). Its defense of this disparate treatment hinges on a single justification (Br. 1): "the vast majority" of white panelists "favored the death penalty and were willing to impose it, while the vast majority of African-American panelists were either opposed to the death penalty or were unwilling to impose it." Whatever the merit of that racial generalization, on this record the State's claim is "simply too incredible" to sustain the State's peremptory strikes, *Hernandez* v. *New York*, 500 U.S. 352, 369 (1991) (plurality), because the African-Americans struck by the State and the whites accepted by the State actually possessed remarkably *similar* views; if anything, the African-Americans struck were *more* supportive of the death penalty.

Space limitations preclude a juror-by-juror refutation of the State's contention (Br. 35) that its concededly disparate treatment of challenged African-American veniremembers

was warranted by their "divergen[t] views." Three examples prove the point—all the more so since the race-based exclusion of even a *single* qualified veniremember suffices to invalidate the entire process. *See Batson*, 476 U.S. at 95-96.

1. Billy Jean Fields. The State offered (Br. 5) two reasons for its peremptory strike of Fields: his religious belief in rehabilitation could impede his willingness to impose a death sentence, and his brother's criminal conviction. The record shows, however, that, if anything, Fields was *more* supportive of the death penalty than white jurors whom the State found qualified. Fields expressed unambiguous support for the death penalty in his questionnaire. JL 20. He answered "yes" to the question whether he believed in the death penalty, and then wrote that "[i]f you commit the crime[,] pay the pen[alt]y," *id.*; he also answered that he had no "moral, religious, or personal beliefs that would prevent [him] from returning a verdict which would ultimately result in the execution of another human being," *id.* Fields confirmed these beliefs during voir dire, stating unequivocally that he believed in the deterrent effect of the death penalty, JA 108-109, that he had no philosophical or religious reservations about the death penalty, JA 108, that he had never felt differently about the death penalty, JA 109, and, most importantly, that he had no "reservations at all" about imposing the death penalty, JA 111.

The State contends (Br. 4-5) that Fields' religious beliefs would have impeded his ability to impose the death penalty because "Fields asserted his personal religious belief that no one is beyond rehabilitation." Fields actually explained, however, that his religious views led him to *support* the death penalty. JA 108. At the outset of his voir dire, the prosecutor asked Fields to explain how he felt about the death penalty and his ability to impose it. Fields answered: "According to the Old Testament, people were killed if they violated His law. In its extended service, the State represents Him if the crime has been committed and death is warranted"; Fields then explained that in his view "the State is God's extended person" and "if the State exacts death, then that's what it should be." JA 108.

The State's discussion of Fields' voir dire is selective and misleading. Although Fields did suggest that everyone can be rehabilitated, JA 118, the State neglects to mention his unequivocal response to the very next question: *Asked whether he could impose the death penalty on a person that he felt was repentant and could be rehabilitated, Fields answered "Yes."* JA 118-19 (emphasis added). Fields also explained that his willingness to impose the death penalty was fully consistent with his views on rehabilitation: "If for some reason the testimony didn't warrant death, then life imprisonment would give an individual an opportunity to rehabilitate. But, you know, you said that jurors didn't have the opportunity to make a personal decision in the matter with reference to what I thought or felt, but it was just based on the [capital sentencing] questions according to the way the law has been handed down." JA 119. Not surprisingly, the prosecutors wrote on Fields' juror questionnaire that he had "no reservations against" the death penalty. JL 20.[1] Respondent's claim (Br. 5) that Fields was struck because of his views on rehabilitation finds no support in the record.

Indeed, the implausibility of that claim is all the more evident given the views on rehabilitation expressed by a white juror whom the State did not strike. Like Fields, Sandra Hearn indicated on her juror questionnaire that she believed in the death penalty. JL 213. But unlike Fields, who used the explanatory spaces to write "[i]f you commit the crime[,] pay the pen[alt]y," Hearn used the same space to hedge her answer, asserting that she believed in the death penalty only "[i]f a convicted criminal continue[s] to commit crimes after rehabilitation in prison—especially killing people." *Id.* At voir dire she reiterated: "I believe in the death

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[1] Moreover, Fields appeared in all respects to be a quintessential State's juror. A veteran, he was 47 years old, had worked for the Postal Service for 18 years, was married with four children, and attended church regularly. JL 15-16; JA 125-27.

penalty if a criminal cannot be rehabilitated and continues to commit the same type of crime. *I do not think anyone should be sentenced to a death penalty on [a] first offense.*" JA 694 (emphasis added). Although Hearn said she "did not see any reason why [she] couldn't sit on a [capital] jury," *id.*, she added that she believed in the death penalty only "for certain types of cases," App.12a-13a,[2] and that "if someone goes out and commits a murder and it's his first offense, I do not think he should have the death penalty imposed upon him," *id.*[3]

Not only did Hearn repeatedly express her belief that death was inappropriate for a first offense of murder, but in stark contrast to Fields, she also clearly stated that her views about rehabilitation *could* affect her ability to impose the death penalty. Asked if she could answer the capital sentencing question about the probability that the defendant would commit another violent crime, she stated, "No, I can't say I could answer that. . . . Well, the evidence would have to be awful strong. People change, so I can't really say I could answer that." App.13a. Hearn even indicated that she could *never* answer "yes" to the continuing threat question for a first offender. App.16a-17a.[4]

Respondent stresses Hearn's willingness to impose the death penalty by asserting (Br. 11) that Hearn "stated firmly . . . throughout individual voir dire that she . . . could assess the death penalty in an appropriate case." But respondent neglects to inform the Court that the *only* first offenses that

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[2] Excerpts from the Voir Dire Record are appended.

[3] Hearn repeatedly reaffirmed her opposition to the death penalty for first-time offenders. App.15a ("I do not believe in the death penalty there. I think that he ought to be given a chance to have rehabilitation."); App.15a ("Q: a person who commits the offense of murder for the first time, it is your belief that person should not receive the death penalty, is that correct? A: Yes, sir. Q: Regardless of what the facts are, regardless of what the circumstances are? A: Yes.").

[4] Hearn said: "I would answer it no. . . . [T]he key word in that question number two is continuing and how can you say a first offender of a capital murder will be a continuing threat to society? . . . I don't think [a person with no prior history can be a continuing threat to society]."

Hearn considered "appropriate" for the death penalty were "torture" and "extreme child abuse." App.14a. In fact, at the close of voir dire, she again confirmed that she "couldn't assess the death penalty" on a first offender. App.17a.[5] Given that the potential impact of Hearn's views on rehabilitation was far greater than that of Fields, the notion that Fields was struck because of his views on rehabilitation is "simply . . . incredible." *Hernandez*, 500 U.S. at 369.

The State's claim (Br. 5) that it struck Fields because his "brother had been convicted of a felony" is also patently implausible. Fields noted that his brother "was arrested and convicted on [a] number of occasions for possession of a controlled substance," that his brother had "served time," but that he did not "really know too much about it." JA 124; 133-34. The following colloquy then took place (JA 124): "Q: Do you feel that that would in any way interfere with your service on this jury at all? A: No."

White veniremember Noad Vickery similarly noted that his sister had been convicted of a criminal offense, that she had "served time in the penitentiary" but that he "was a teenager [at the time] and d[i]dn't know the details." JA 435-36. The following colloquy then took place (JA 436):

> Q: Would that affect your ability to serve as a juror in this case?
>
> A: I don't think so, no.
>
> Q: You keep on saying 'I don't think so.' When you say I don't think so, you're saying that's no?
>
> A: No, it would not. I'm sorry.

Respondent asserts (Br. 15-16) that Vickery's "circumstances" with respect to his sister's criminal history were "qualitatively different from those of Fields." But other than

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[5] The trial judge then stated, "Let me put that belief of yours aside," and proceeded to explain why her view was inconsistent with the law. App. 17a-18a. With this prompting, Hearn finally answered "yes" to the trial judge's question whether "if the evidence to [question] number two showed you beyond a reasonable doubt that *it ought to be answered yes* . . . could you answer it yes?" App. 18a (emphasis added).

race, the State identified no difference. If anything, Vickery was the *less* attractive juror, given his hedging about whether his sister's criminal past would affect his impartiality.[6]

Even if the combination of the two proffered reasons for striking Fields were somehow greater than the sum of its parts, the State's rationale is still implausible. In addition to having a sibling with a criminal past, Vickery expressed much *greater* hesitation about the death penalty than did Fields. Vickery indicated on his questionnaire that he wasn't sure what he believed about the death penalty, App.4a-5a, and during voir dire stated, "I honestly can't tell you . . . how I feel" about it, App.4a. Yet the State accepted the white Vickery and struck the African-American Fields. Because Fields was indistinguishable from white jurors whom the State accepted, respondent cannot plausibly claim (Br. 35) that it struck Fields based on his "divergen[t] views."

2. Joe Warren. The State argues (Br. 6) that it removed Warren because of his "hesitation about imposing the death penalty and his inconsistent responses during voir dire." Once again, however, the State misrepresents the record, repeatedly taking Warren's statements out of context in an attempt to manufacture "hesitation" and inconsistency when none existed. Noting (Br. 5) that Warren agreed with the death penalty for some cases but not for others (an answer that on its face surely comports with the views of any reasonable supporter of the death penalty, since no one reasonably could support the death penalty in *every* criminal case), respondent then omits Warren's answers to the questions immediately following that statement. He explained that self-defense would be an example of the kind of case for which he did not believe in the death penalty, and that he had "never" disapproved of the death penalty generally, JA 137, 139. Warren also stated that he had no moral, religious, or

[6] A family history of criminality seemed to bother the State only if the prospective juror was African-American. *See* Petr. Br. 22 (describing family criminal histories of four white jurors accepted by the State).

personal objections that would prevent him from imposing it. JL 28. This testimony is neither hesitant nor inconsistent.

Respondent also tries misleadingly (Br. 5) to portray Warren as equivocal for answering "I think I could" about imposing the death penalty. But the passage respondent cites was actually Warren's response to the question whether he could impose the death penalty *directly*, as jurors did under the *old* law—a question the prosecutor himself characterized as a "trick question." JA 141-42. Asked whether he could answer the capital sentencing questions the law in fact would require him to answer, Warren's response was unequivocal: "Q: You're not writing death, but three [yes] answers equal death. Make no mistake about it. Could you do that? A: Yes, I could." *Id.* He later affirmed his ability to impose death, noting that, "[b]ased on the evidence, I would answer [the questions] accordingly." JA 144.[7]

Warren's views were materially identical to those of white panelist Marie Mazza, who served on the jury. Mazza, like Warren, indicated on her questionnaire that she believed in the death penalty, but also, like Warren, wrote that it "depends on [the] crime." JL 148; *compare* JL 28 (Warren: "in some cases"). The State misleadingly omits this qualification (Br. 12). Mazza's voir dire testimony was also remarkably similar to Warren's. Warren explained that the imposition of the death penalty "depends on the case and the circumstances at the time," JA 139; Mazza noted that imposition of the

[7] The State also insinuates (Br. 5) that there were capital cases that Warren did not want to be involved in. The passage cited, however (JA 146), discusses non-capital cases in the context of *minimum* sentencing.

Perhaps most egregiously, the State attempts (Br. 5) to portray Warren as "hesitant" about imposing the death penalty because he supposedly expressed "mixed feelings" about whether it served a purpose. But reading the cited passage in context reveals that Warren actually believed that the defendant might not suffer *enough* if he were executed. JA 140 ("[S]ometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. . . . So, . . . sometimes you have mixed feelings about whether or not [the death penalty] is punishment.").

death penalty "is not an easy [decision] and I feel that it depends upon the case, the testimony," App.5a.

Moreover, the State's explanations for its strikes to *this* Court reflect a new racial double standard. The State simply absolves Mazza for her expressions of hesitancy, claiming (Br. 12) that "[f]or the remainder of the examination, Mazza expressed no hesitancy concerning her ability to assess a death sentence." Yet respondent does not afford the same benefit to African-American panelists. Indeed, she argues explicitly (Br. 36) that African-Americans' subsequent non-hesitating answers could *not* redeem any previous hesitancy.

3. Edwin Rand. The State defends its strike of Rand as based on his supposed "ambivalence" about the death penalty and his ability to impose it. The State argues (Br. 6-7) that Rand showed ambivalence because he described the death penalty as a "touchy subject." But the State omits his full answer, in which he explained—like white juror Mazza—that he meant imposing it would depend on the circumstances, JA 158, and that the death penalty was not appropriate for "self-defense or an accidental type thing." JA 159. While Rand was initially hesitant about imposing the death penalty, JA 161, for the remainder of voir dire he expressed no hesitation whatsoever. Asked, for example, "knowing that, . . . without option that [it] results in . . . assessing the death penalty for that man sitting right down there? Do you feel like you can do that?," Rand answered: "Yes, I do." JA 162. Asked, "you can answer those questions yes knowing that the result would be that that man would be executed?," Rand answered, "Yes, I could." JA 164. When the prosecutor demanded, "You're telling me you can do that?," Rand responded: "Yes." *Id.* Respondent cannot give any explanation as to how this pattern of responses is in any way different from those given by white juror Mazza.[8]

[8] Our opening brief (at 23-24, 26) demonstrates that the other three qualified African-Americans struck by the State—Boggess, Kennedy, and Bozeman—also held views similar to those of white jurors Hearn and Mazza. Here again, the State blatantly misrepresents the record in an attempt to create the appearance of divergent views: The State claims, for example, (Br. 4) that Bozeman classified himself as someone who "could not serve on a capital jury." But when asked specifically whether he could serve on a capital jury, Bozeman twice unequivocally answered yes. JA 82. He also elaborated on this point, noting that "I'd have to vote with the proof, you know, no matter how I felt. If the answer was yes, then I would have to put yes no matter how I felt about it." JA 93.

Because the State's rationales do not withstand scrutiny, no factor other than race remains to explain its strikes of a grossly disproportionate number of African-Americans.

B. The State's Attempt To Demonstrate A Parallelism Between The Whites And African-Americans It Struck Is Specious.

Just as the State fails to demonstrate that the views expressed by African-Americans it struck differed materially from those expressed by white jurors it accepted, so too the State fails in its effort to maintain (Br. 11) that the peremptorily struck African-Americans were materially identical to the four white panelists that it peremptorily struck. Respondent argues that the prosecutors struck three of these white panelists because of mere ambivalence about the death penalty. These veniremembers, however, expressed very strong opposition that was anything *but* ambivalent.[9] In an obvious attempt to portray the fourth panelist's views as more similar to those of the struck African-Americans, the State claims (*id.*) that Penny Crowson was struck despite having "expressed a firm belief in the death penalty." Crowson, however, stated that if she "thought there was a chance that the Defendant could be rehabilitated, [she] would probably not go with the death penalty." App.3a. Asked again about her beliefs, she responded, "I'm not 100% certain that my mind is made up at this moment." App.3a-4a. Contrary to the

[9] Gibson, App.1a ("I don't believe in the death penalty" and could "never" impose it); Holtz, App.2a (death penalty "[i]s inhumane"); Whaley, App.9a ("the death penalty should be the very last resort. It would have to be a very clear-cut case where it was premeditation, obvious premeditation, and a very deliberate and cold-blooded act.").

State's claim, these statements hardly manifest a "firm belief in the death penalty." In fact, all four whites struck by the State held views clearly less supportive of the death penalty than those of the struck African-Americans at issue here.

C. The State's Justifications Were Pretextual; Contrary Findings Reflect An Unreasonable Determination Of The Facts In Light Of The Evidence.

Invoking specified characteristics to justify striking African-Americans when those same characteristics are equally evident in whites not struck is a classic example of pretext. *See* Petr. Br. 43 & n.34. Because, as demonstrated above, the State's reasons for striking African-Americans apply equally to whites whom the State accepted, the conclusion that these reasons are pretextual is inescapable.[10]

Moreover, although a single exclusion based on race establishes a *Batson* violation, the "level of suspicion" about the prosecutor's motives may "be raised by a series of very weak explanations" for peremptory challenges. *See Riley*, 277 F.3d at 283 (quoting *Caldwell* v. *Maloney*, 159 F.3d 639, 651 (1st Cir. 1998)). Here, the "divergent views" rationale for each of the strikes is not just weak, but illusory. The "level of suspicion," therefore, is appropriately very high.

The State seeks solace (Br. 36) in the contention that whether veniremembers are similarly situated is the kind of "subjective consideration[]" that is "not easily assessed from

[10] *See, e.g.*, *Riley* v. *Taylor*, 277 F.3d 261, 279-80 (3d Cir. 2001) (en banc) (pretext where prosecution's reason for striking African-American—that he would be unwilling to impose death penalty—was not supported by the record, and where another African-American was struck absent basis for distinguishing him from white juror not struck); *Ford* v. *Norris*, 67 F.3d 162, 168-69 (8th Cir. 1995) (pretext where prosecutor claimed African-American struck for not being "strong on the death penalty" but where struck panelist's responses were stronger than responses of several accepted white jurors); *Bennett* v. *Collins*, 852 F. Supp. 570, 580, 584 (E.D. Tex. 1994) (pretext where prosecutor claimed African-American struck for not being able to articulate facts justifying death penalty, but white jurors similarly unable to articulate such facts seated).

a cold record." Of course, the trial court has the considerable advantage of viewing the participants' demeanors, but the trial judge is not the sole arbiter of whether a *Batson* violation has occurred.[11] In any event, here the State's justification for disparate treatment rests on the *content* of the panelists' responses, not their demeanor or credibility.

To support its claim that the statistical disparity in the State's strikes simply reflects a racial "divergence of views" on the death penalty, respondent contends (Br. 9-10) that "more than 70% of non-minority veniremembers had no qualms about either the death penalty generally or their willingness to impose it," while "67% of African-American venire members" either opposed the death penalty or were unwilling to impose it. These calculations, however, are based on demonstrably inaccurate characterizations of the veniremembers' views about the death penalty. For example, respondent includes white jurors Mazza and Hearn in the "no qualms" category, even though their voir dire testimony cannot fairly be characterized in that way. *See supra* pp. 3-5; 7-8. And respondent includes African-American panelists Bozeman and Boggess in the "opposed to or unwilling to impose" category, even though they both disclaimed that position during voir dire.[12] Of the 11 qualified African-

[11] *See Riley*, 277 F.3d at 278; *McClain* v. *Prunty*, 217 F.3d 1209, 1221-1224 (9th Cir. 2000); *United States* v. *Serino*, 163 F.3d 91, 93 (1st Cir. 1998); *Coulter* v. *Gilmore*, 155 F.3d 912, 919-921 (7th Cir. 1998); *Horton* v. *Zant*, 941 F.2d 1449, 1457-1460 (11th Cir. 1991).

Respondent now asserts (Br. 32) that "there is no dispute that Miller-El presented a prima facie claim under *Batson*'s first step," but that concession would presumably have astounded the trial judge, who somehow concluded that petitioner had failed to make a prima facie showing, JA 876, despite having been instructed by the court of appeals to the contrary, JA 835.

[12] Although Boggess initially expressed some concern about serving on a capital jury—perhaps in reaction to the prosecution's use of its "graphic" description of an execution—she was clear about her ability to impose the death penalty:

Q: You do believe in the death penalty?

Americans, only four, or 36%, can fairly be described as opposed to or unwilling to impose the death penalty.[13]

Moreover, even if respondent's 67% figure were correct, it would not come close to justifying the prosecution's exclusion of *91%* of African-Americans.[14] Disparity of that magnitude is precisely the kind that is "difficult to explain on nonracial grounds." *Batson*, 476 U.S. at 93. And it renders particularly suspect respondent's attempted refuge (Br. 37) in the "intuitive assumptions" exercised by the prosecutors.

D. The Entire Jury Selection Process Reveals Both Intent To Discriminate And Pretextual Excuses.

1. The jury shuffle

So-called jury shuffles give both sides the opportunity to move "visually preferred" veniremembers toward the front of the panel and thus increase those jurors' chances of selection. *Ford* v. *State*, 73 S.W.3d 923, 931 (Tex. Crim. App. 2002) (Holcomb, J., diss.). Thus, they provide a perfect opportunity to discriminate for those who "are of a mind to discriminate." *Batson*, 476 U.S. at 96.[15] The prosecutors in this case made ample use of that opportunity.

A: Yes.
Q: And you say you could serve on the jury?
A: Yes.
Q: Even though it meant that it might be a tough decision?
A: Yes.
Q: Even though it meant that, if you answered all three of those questions yes based on the evidence, you know it would result in the execution of this Defendant?
A: Yes.
Q: So whatever personal feelings, religious or moral, that you have, you would not have to compromise them; you could serve on the jury and go ahead and answer those questions?
A: Yes.

JA 200. Bozeman also, after initial hesitation, stated unequivocally that he could impose the death penalty. *See supra* note 8.

[13] Baker, App.8a-9a; Mackey, App.10a; Bailey, App.10a-11a; Keaton, App.11a-12a.

[14] Using the State's own figures, African-Americans were a little more than twice as likely to be opposed to or unwilling to impose the death penalty as whites (67%/30%), but they were *seven* times more likely to be peremptorily struck by the State (91%/13%).

Most of the facts about the jury shuffle process during the third week of voir dire are undisputed. During that week, as throughout the process, the prosecutors annotated their juror information cards to indicate the race of each panel member. *See* JL 54-108. The initial array of veniremembers included six African-Americans near the front, in seats 1, 2, 3, 4, 8, and 15. JA 61. After the State's shuffle, the African-American panel members were near the back, in seats 19, 26, 36, 37, 38, and 39. JA 62. The defense then performed its shuffle, which ultimately moved the African-American panel members back toward the front, in seats 1, 2, 3, 4, 7, and 14. *Id.* The State objected to the defense's shuffle, and the trial judge overruled the objection. JA 65.

The obvious reason for the State's objection to the defense's shuffle is that it moved African-Americans from the back to the front of the venire and thus increased the odds of African-Americans serving on the jury. Both alternative explanations offered by respondent are transparently disingenuous. The first basis for the State's objection was that the defense shuffle took place in the central jury room rather than in the courtroom. But as the trial judged noted, "I've sat and practiced law in Dallas County for 25 years or longer and we've always gone to the central jury room." JA 64.[16] The State's second claim was apparently that the defense shuffle wasn't sufficiently vigorous, so that many panel members simply moved from front to back or vice versa. JA 57. But that could hardly have been a bona fide objection, for the State's own shuffle resulted in virtually the same sort of clumping, with four African-Americans in a row near the

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[15] "In practice, the shuffle is used to reconfigure the seating positions of the jury panel to enhance the opportunity to select members of particular racial or gender groups during the voir dire process." D. Bobbitt, *The Texas Jury Shuffle*, 57 Tex. Bar J. 596, 596 (1994).

[16] The 5 preceding shuffles in this case—two each in weeks 1 and 2, and the State's during week 3—all took place in the central jury room.

front becoming four African-Americans in a row at the back. The State's expressed concern reflected nothing more than unhappiness with the movement of African-Americans from the back to the front. That race *alone* formed the basis for this concern is clear; the jury shuffle *precedes* all substantive exchange with individual jurors.

Respondent protests (Br. 22, 37) that racial discrimination could not have been the motive for the State's objection because the prosecution raised the objection before it knew the effect of the defense's shuffle on the ordering of the panel members by race. Putting aside the fact that the State did *not* raise its formal objection until after the results of the defense shuffle had been revealed, JA 59, 64-65, the timing of the prosecution's initial complaint only supports its racial motivation. During the third week of voir dire, the State used its shuffle as a "strategic tool," *Ford*, 73 S.W.3d at 926, to move a clump of African-American veniremembers from the front of the panel to the back. Even before the defense began shuffling, the prosecution could anticipate that the defense's shuffle would cause some of those African-Americans to wind up closer to the front of the panel again. If the prosecutor was upset that the defense employed in reverse the very clumping he had used to push African-Americans away from jury service, his objection was not thereby free of bias. To the contrary, his concern about that sort of clumping plainly was driven solely by the racial composition of the "clump."[17]

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[17] Perhaps recognizing that the State's conduct during the third week of voir dire reveals the racial bias informing its jury selection, respondent notes (Br. 23 & n.48) that during the fourth and fifth weeks it declined shuffles even though those weeks' panels had 2 and 4 African-Americans within the first 15 seats respectively. Any implication of lack of concern with the jury's racial composition is wholly misleading. Indeed the record actually suggests the State's *dissatisfaction* with African-Americans near the front of the venire. First, respondent neglects to acknowledge that the placement of African-Americans toward the front of the venire during both of those weeks occurred only *after* the defense had exercised its right to shuffle (the prosecution having previously declined). The record does not reveal what the placement of the African-Americans was when the State declined to shuffle. Thus, the State's initial decision not to shuffle says nothing about its preferences concerning the racial makeup of petitioner's jury. Second, despite the judge's established practice of requiring the State to go first, the State objected after the defense's fourth week shuffle had moved two African-Americans to the front, and the State sought belatedly to get in a shuffle of its own. App.6a-8a. The judge refused to give the prosecutor a second chance. *Id.* Thus, far from supporting the notion that the State "decline[d] shuffles" when African-Americans were at the front, the record reveals instead that, whenever it had the opportunity—and once even when it did not—the State sought to use its shuffle right to keep African-Americans off the jury.

2. The State's admittedly disparate questioning

Abandoning one of the trial court's central factual findings, respondent now acknowledges (Br. 16) that the State "employed disparate questioning" methods on different groups of jurors.[18] The State used its "graphic script" concerning executions with 8 of 15 (53%) African-American veniremembers, but only 3 of 49 (1.5%) white veniremembers. Petr. Br. 14. Respondent contends that that stunning racial disparity resulted from black and white veniremembers' differing views about the death penalty, but respondent's own numbers do not support her contention. While the State used the graphic script with nearly 3/4 of the African-Americans who expressed any reservation about the death penalty on their questionnaires, by its own count it used that script with only 1/5 of the white panel members who expressed similar reservations.[19] The State offers no explanation for that gap, and there is none other than race.[20]

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[18] The state trial court found that "no disparate prosecutorial examination of any of the veniremen in question has been shown." JA 878.

[19] By respondent's own reckoning (Br. 17-18 & n.39), the State used its graphic script with 7 of 10 African-Americans who expressed death penalty reservations. By contrast, respondent identifies (Br. 18 nn.38, 39) only 2 white panelists who expressed reservations about the death penalty and were subjected to the graphic script. The other 8 whites who expressed reservations were not subjected to the script.

[20] Moreover, the State's targeting of African-Americans for the tougher questioning of the graphic script may well have produced a self-fulfilling prophecy in which the racially motivated tougher questioning

An equally stark racial disparity is evident in the State's questioning concerning minimum punishments. Again, the State's own figures leave a deliberate effort to exclude African-Americans as the only plausible explanation for the disparity. The State used the manipulative method of not identifying the statutory minimum punishment at the outset with 7 of 8 (87.5%) African-American jurors questioned on this issue.[21] By contrast, according to the State's own count (Br. 19 & n.42), it used that script with only 2 of 36 (6%) white panelists.[22] Once again, the State signally fails to offer any

itself contributed to an apparent racial divergence in panel members' responses. African-Americans were questioned more aggressively, and so they predictably gave more equivocal answers; those answers were then used to exclude them on supposedly non-racial grounds. Thus, the racially motivated questioning method, as much as any genuine divergence in underlying views, may explain any statistical difference in the responses of African-American and white members of the venire.

[21] Respondent accuses us (Br. 19) of a "serious misstatement[] of the record" because our opening brief asserts (at 17) that the prosecution used the manipulative method of questioning with "all but one of the African American jurors." But it is respondent's alleged correction that is misleading. The phrasing of our opening brief should indeed have made clear that the State used its manipulative method of questioning against all but one of the African-Americans *who were questioned about minimum punishments*, not against all but one of the African-Americans altogether. But as respondent's own insistence concerning white veniremembers makes clear, *see infra* note 22, it is the number of veniremembers actually questioned about minimum punishments that constitutes the appropriate denominator for calculating the frequency with which the State used a particular questioning technique. Thus, respondent's assertion that the State used its manipulative approach on only 7 of 15 African-Americans fails to acknowledge that only 8 of those 15 African-Americans were questioned about minimum punishments at all. Respondent uses the larger denominator for African-Americans but not whites in order to reduce inaccurately the apparent gap between the frequency with which the State used that method against African-Americans and the frequency with which it used that method against whites. Forthright analysis requires using equivalent denominators for both groups.

[22] Respondent again accuses us (Br. 19) of "serious misstatement," but again the error proves to be minor and respondent's correction only drives home the accuracy of our point. Our opening brief inadvertently

explanation for this stark contrast in its treatment of black and white veniremembers.[23]

II. THE RACIALLY MOTIVATED STRIKES IN THIS CASE MIRROR THE HISTORY OF DISCRIMINATION IN DALLAS COUNTY.

Respondent's assertion that the statistical disparity in this case is just coincidence is even more implausible in light of the record evidence of the Dallas County D.A.'s history of excluding African-Americans from jury service. Respondent attempts to divert attention from this powerful contextual evidence by quibbling (Br. 28) about evidentiary rulings at the *Swain* hearing. But contrary to the State's assertion, the three *Morning News* articles *were* in evidence at the *Batson* hearing. JA 843-44. Also contrary to the State's assertion (Br. 28 n.61), the statistical evidence in those articles of a pattern and practice of discrimination is in fact uncontested.[24]

stated (at 17) that the State used the friendlier method of questioning with 47 of 49 (96%) white veniremembers when it should have said 34 of 36 (94%). The essential point remains: all but two whites questioned about minimum sentences received the friendly approach, while all but one African-American questioned about minimum sentences had to cope with the State's admittedly manipulative method of questioning.

[23] Respondent's only reply (Br. 18-20) explains nothing about the dramatic racial disparity in the State's questioning. Respondent claims that 7 of the 8 African-Americans subjected to manipulative questioning had expressed some reservation about the death penalty on their juror questionnaires. Putting aside whether that characterization is accurate in all 7 cases—and also putting aside the State's failure to make a similar claim about the 8th African-American even though hesitancy about the death penalty was supposedly the sole trigger for the State's use of its manipulative script—that pattern leaves unexplained the State's failure to use its manipulative method with the vast majority of white veniremembers who expressed reservations about the death penalty.

[24] The State claims that the evidence was uncontested only because it was not admitted. However, the evidence *was* admitted. JA 843-44. Moreover, the State never attempted to contest the accuracy of the cited statistics, objecting to the articles' admission only on the grounds that such evidence of pattern and practice discrimination was irrelevant to a *Batson* claim. JA 841-42. Moreover, both the Henry Wade quote and the

Just as a pretextual explanation for one peremptory strike should increase the skepticism to which additional strikes are subjected, so too should evidence of a pattern and practice of racial discrimination in jury selection by the Dallas County prosecutor's office shed light on the actions of the prosecutors in this case. Not only does the record reveal an "appalling" practice of racial discrimination in jury selection in the Dallas County prosecutor's office, JA 919, but that office continued to distribute a training manual into the 1980's that explicitly directed prosecutors to exclude all minorities from petit juries.[25] Petr. Br. 4. And the prosecutors in this case were found to have engaged in discriminatory jury selection practices in other cases.[26] *See* Petr. Br. 5. Moreover, the statistics cited in the *Morning News* study, (as well as by Justice Marshall in *Batson* itself, *see* 476 U.S. at 104 & n.4 (concurring opinion)), that the chance of a qualified African-American sitting on a Dallas County jury was 1 in 10, compared to 1 in 2 for a white, mirrors the statistical breakdown in this case. To claim that such statistical evidence is not "relevant" to the inquiry here defies rationality, as does the conclusion that the racial disparity *in this case* is not attributable to racial discrimination.[27]

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reference to the 1963 training manual, Petr. Br. 3-4; JA 709-10, are in the March 9 article and are thus also properly part of the evidentiary record.

[25] Respondent misstates the testimony of two witnesses in this regard by asserting unequivocally (Br. 40) that the Sparling paper was no longer in the prosecution manual in 1986. However, both Sparling (JA 741) and Judge Baraka (JA 774) testified that they did not know whether the Sparling paper remained part of the manual in 1986.

[26] Although these cases were "not before the trial court" (Br. 28), both had been decided before the state appeals court made its ruling. As a matter of precedent, therefore, they were before the state courts when the final *Batson* determination was made. Thus they are part of the "evidence presented in the State court proceeding," properly considered when deciding whether the state courts' determination was unreasonable.

[27] Before the state courts, respondent argued that a history of discrimination was "irrelevant" to a *Batson* claim. JA 842 (even if "no black had ever served" on a Dallas jury, that evidence would be "irrelevant" to the *Batson* claim). But before this Court respondent not only concedes that "all relevant evidence should be considered" (Br. 38), but argues that the judge *did* consider such historical evidence in making his decision (Br. 40). However, the record suggests that, in evaluating the credibility of the State's explanations, the judge took no account of evidence the State now concedes is relevant to that determination. JA 877-78 (findings and conclusions making no reference to pattern and practice evidence).

III. THE COURT USED INCORRECT STANDARDS.

A. The Erroneous COA Standard.

Respondent asserts (Br. 42-44) that the court of appeals applied the correct legal standard in denying petitioner's request for a COA, but the court's opinion demonstrates otherwise. To be sure, the court recited the proper COA standard near the outset of its opinion. Its error, however, lay not in failing to *acknowledge* the proper standard, but in failing to *use* it. The very sentence respondent quotes (selectively) as showing the court's reliance on the proper standard betrays its failure to employ that standard. After three pages addressing *the merits* of petitioners' *Batson* claim, the court said: "*Having determined* that the state court's adjudication neither resulted in a decision that was unreasonable in light of the evidence presented nor resulted in a decision contrary to clearly established federal law as determined by the Supreme Court, *we conclude* that this issue would not be debatable among jurists of reason, that courts could not resolve the issue in a different manner, and that the issue does not deserve encouragement to proceed further." JA 961 (emphasis added). In other words, *having determined* that petitioner's claim fails on the merits, *we conclude* that it fails the COA standard of being debatable among jurists of reason. Respondent quotes only the second half of the court's statement in an effort to suggest misleadingly that the court rejected petitioner's request after carefully applying the COA standard. The full sentence makes plain that, on the contrary, the court jumped straight from a rejection of petitioner's claim on the merits to a rejection of petitioner's request for a COA, a leap that leaves no doubt that the court of appeals failed to

give any attention to the distinct "threshold inquiry" required by *Slack* v. *McDaniel*, 529 U.S. 473, 482 (2000).

B. The Erroneous Merits Standard.

When it comes to the relationship between sections 2254(d)(2) and 2254(e)(1), respondent appears to accept much of our position. She agrees (Br. 47-48) that the two sections establish distinct standards, and that in cases involving multiple findings contributing to an overall factual determination, the correctness of the particular findings must be assessed under § 2254(e)(1)'s clear and convincing standard and the ultimate factual determination must be judged under § 2254(d)(2)'s unreasonableness standard. Respondent also seems to accept (Br. 48-50) that "when the court reviews a claim whose resolution depends on a single factual determination," the § 2254(d)(2) and § 2254(e)(1) standards are, as a practical matter, equivalent. *See* Petr. Br. 37 n.30.

The court of appeals, however, failed to apply these principles. Instead of treating § 2254(d)(2) and § 2254(e)(1) as distinct but in this case equivalent standards, the court layered one on top of the other, thus creating a compounded, more demanding, standard of review. The court held that it was not enough to show that the state courts' factual determination was "unreasonable . . . in light of the evidence presented," or that their factual finding was incorrect by clear and convincing evidence. Petitioner had instead to bear the burden of demonstrating "*the unreasonableness*, if any, . . . by clear and convincing evidence." JA 960 (emphasis added). As explained in our opening brief (Br. 35-38), that transformation of § 2254(e)(1) from a free-standing requirement into an add-on component of the standard set out in § 2254(d)(2) flies in the face of the statute's text and structure, and conflicts with this Court's reasoning in *Williams* v. *Taylor*, 529 U.S. 362, 411 (2000).

CONCLUSION

The Court should reverse the judgment of the court of appeals and grant the petition for a writ of habeas corpus.

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APPENDIX

Voir Dire Transcript Excerpts

[485] punishment and then, secondly, probably just as important, your ability or inability to actually on a jury of this type and render a decision or actually participate potentially in the execution of the Defendant?

A I don't believe in the death penalty. I don't know why it was started. I don't think it solves anything. It's the ultimate punishment and it's part of the law and, if the law so renders the death penalty, I can't stop it, but I personally do not believe in it.

Q Is this for any particular reason? Is this a personal feeling that you have about it or --

A It's a personal belief.

Q All right. Have you felt this way for some number of years or just—is it something you've thought about, you know, more seriously, of course, when you were asked or informed that you were going to be a prospective juror on this type of case?

A Oh, I think I answered that my gut reaction was that I don't believe in it and I never really thought much further than that. I

* * * *

[492] Q Regardless of the evidence and regardless of the facts. You could vote for something else, maybe a life sentence?

A Yes.

Q Or some number of years, but never death?

A Never.

Q Okay. About thirteen years ago, the law changed. It's no longer done that way. It's not done directly, but the procedure up to that point is largely the same. You know the evidentiary phases are the same, the same type of testimony

largely is admissible, basically the same types of offenses, you know, very serious types of crimes. In this case, now, it's murder. In some instances it must be murder of a particular class of individual or murder plus another offense. A murder and a robbery is alleged in this indictment. A murder during rape, kidnapping, arson, burglary. The difference comes in at the very end of the trial when you go back to decide—make certain decisions. It is no longer decided directly. Instead, as the Judge told you on Monday, you take back with you two or

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[1024] Jim—I'm going to try and go back over some of the things you say. In the process, if I misstate something --

A I'll correct you.

Q Yes, raise your hand and let me know. In all other circumstances, you believe that a life sentence is a proper verdict?

A Yes, sir.

Q Why do you feel that way?

A I've always felt that the penalty was inhumane. I've never really been comfortable with the death penalty. Rhode Island is—the education there is fairly liberal. In school we spent a lot of the time dealing with social studies and civil court and criminal law and we rehashed that years and years ago and the opinion that I formed at that time was one that I still hold true. There are a number of reasons that I don' believe in the death penalty. I've just never felt that, barring circumstances where police officers are involved, another human's life should be taken. I'm not a believer in the eye for an eye.

Q Okay. I'm going to let you talk as much as you can because every one has heard

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[1211] the death penalty or you believe in the death penalty?

A I believe that it depends on how serious the crime is and it would also depend on whether the Defendant could be rehabilitated. It would depend on—the punishment that I would go with would depend on what their past record was and whether I thought there was a chance to be rehabilitated. If I thought there was a chance that the Defendant could be rehabilitated, I would probably not go with the death penalty.

Q Okay. That's fair. But you do feel, from what you say, that under certain circumstances the death penalty is warranted and it serves a purpose then; is that right?

A Yes.

Q What you're telling us is, there are some people that cannot be rehabilitated. By looking at their past acts and what they've done, you could tell if they could not be rehabilitated; is that right?

A Well, for instance if they committed a murder and were paroled from prison and then went out and did it again, I wouldn't

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[1221] you paraphrase that? Does that mean he did not do it under the heat of passion? Are those the words that you used before?

Q No. That's something different. That asks if the deceased, the person killed, provoked the killing in any way. Did he do something to provoke his own killing. If he didn't, you have to answer that question yes because the killing was unreasonable. If he did, you would have to make a decision whether the killing was reasonable in response to any provocation.

You've said that you believe in the death penalty under certain circumstances. How long have you felt that way?

A Probably—I don't consider myself being that old—probably not since college. I probably didn't make up my mind. I'm not one hundred percent certain that my mind is

made up at this moment, but I would say that I pretty much—maybe since I was twenty-one or twenty-two.

Q Okay. So five or six years, something like that?

A Uh-huh.

* * * *

[1572] Q Okay. I see the distinction you're making there. I understand a little better what you're saying now. Can I ask you, Mr. Vickery, how you feel personally about the death penalty? Do you feel that it serves a purpose in our society? I remember growing up that there were shows, Queen for a Day or something like that, and if you were governor for a day or if you had the power to decide in the State of Texas whether there was a death penalty or not, would you have the death penalty in certain circumstances or would you not have it at all? How do you feel about it?

A I really don't know how I feel about it, to be honest with you. I think possibly it is something that is required, but then again as a human being, it's hard to say that you want to see someone die. I just honestly can't tell you, you know, how I feel.

Q I understand that these are difficult things and things that we don't deal with every day or think about. You know that the death penalty exists and you know it's out there, but it is something that other people are dealing with.

* * * *

[1611] enough, yet. Okay. Now, can you take an oath that the mandatory penalty of death or imprisonment for life will not affect your deliberation on an issue of fact?

A Would you repeat that, please?

Q Can you take an oath that the mandatory penalty of death or life imprisonment would not affect your deliberation on an issue of fact?

A Yes.

Q You can?

A Yes.

Q Now, you had indicated on your data sheet that you weren't sure what you believed as far as the death penalty is concerned?

A Yes, I put that on there.

Q And subsequent to that, Mr. Nelson talked with you about it and you indicated, if called upon to take the job, as Mr. Nelson indicated, you could, in fact, perform the job duties and responsibilities basically?

A Yes.

Q All right. Now, understanding—and since he used the analogy of a job, I'll

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[2310] feelings about the death penalty with a few minutes to reflect on it, of course. Now, you've had two or three days. Let me just ask you, Marie, to share with us in your own words how you feel about the death penalty, you know, capital punishment generally speaking and then whether or not you feel you could actually serve on this type of a case or are suited to serve on this type of a case?

A The question has never ever entered my mind before the other day. You know, you hear about things, the different cases and such and people going to—you know, as death being the result. I guess I have never ever realized that that could ever be asked of me, to make that determination. In those other cases, I feel the citizens, my fellow citizens, have had to make that decision. It's not an easy one and I feel that it depends upon the case, the testimony. They have to go from everything to make that decision. The choice they made was unanimously that they felt strongly that this was the decision that they felt they needed to make. It's kind of hard determining somebody's life, [2311] whether they live or die, but I feel that is something that is accepted in our courts now and it is something that—a decision that I think I could make one way or the other.

Q You more or less feel it is a responsibility just like the other type of jury service you were on? No one would disagree with you if you feel that it would be a weighty decision because obviously it would be a very weighty decision, a very, very important decision. Knowing yourself as you do, Marie, do you feel, if called upon and presented the type of facts, that you could make that decision that would ultimately result in the execution of Mr. Miller-El under the law?

A It's difficult, I know—and I've had two days to think about it. Toying with my religious upbringing, my family upbringing and such, it depends upon how I feel that the testimony was presented to me and that would be something that I would feel like I could do. It's difficult.

Q Let me ask you. You mentioned your religious feelings and other factors that you've thought about for the last couple of

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[2471] The lawyers, both sides, thought you looked pretty good, but there are considerations here that I'm satisfied that the case is moving along well enough to allow them to do this.

Off the record, Pam.

(Whereupon, an off-the-record discussion was held.)

THE COURT: It has been agreed that Ms. Salapong and Mr. Doiron will also be excused; is that correct?

MR. MACALUSO: Yes, sir.

MR. CUNNINGHAM: Yes, Your Honor.

(Whereupon, this cause was recessed to Monday, February 24, 1986, at which time the following proceedings were held.)

THE COURT: I would like the record to reflect that we had forty jurors seated according to the order they came up in. The [2472] State declined to shuffle and, over their objection, I told the defense they could have a shuffle and that would be the final shuffle. I believe a shuffle was conducted in the Court's office in box and I believe that both defense counsels and one of the prosecutors had an opportunity to shuffle or reorganize, or whatever you want to call it, the jury cards from downstairs and the final order was arrived at. I handed that to the bailiff who is prepared to recall that order. Is that a fair statement of what went on, Mr. Cunningham?

MR. CUNNINGHAM: That's correct.

MR. WEST: That is a true statement.

THE COURT: My clerk was present in my office when all that occurred, although she didn't do anything more than must observe. [2473] The list is going to be reseated now and that will be the final jury list. I believe the State objects not to having another shuffle?

MR. NELSON: Judge, it is the State's position that the law gives each side the right to shuffle and the Court cannot require the State to waive that right prior to the defense exercising their right, necessarily. Based upon that, we'll object to—although we don't know at this point that we would want a shuffle or not, not being given the opportunity --

THE COURT: Good enough.

MR. WEST: Is the record clear that the Court asked the State whether it did want a shuffle and the State indicated that it did not want a shuffle?

THE COURT: The way I've been operating is, to give the [2474] State the first opportunity to shuffle and if they accept or object, that's it.

MR. CUNNINGHAM: That's the way it is presented, if the State goes first, then the Defendant and then the State.

(Whereupon, the jury panel was seated in the courtroom and the following proceedings were held.)

THE COURT: Good morning again, ladies and gentlemen. I appreciate your patience with us. The first thing I

would like to do—let's see. Sir, on the last row, what is your name?

PANEL MEMBER: Brian Hagler.

THE COURT: What I'm going to do, Mr. Hagler for starters, I'm going to call off the names of some jurors that I'm going to excuse from service in this case. It will be the last row there. You-all may return to the central

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[2990] placed on a gurney. He will be strapped down and he will be taken into what we call the death house. At that point he will have an IV placed in his arm, in one of his veins. Someone will put a lethal substance in that IV and it will be pumped into his body until the life is gone from him, that man right down there. That's what we anticipate is going to happen, Ms. Baker, if the evidence comes out as we anticipate it will. Again, the reason I say that is so you will understand that we aren't really talking in the abstract anymore. We're talking about here and now and real people and real death.

Now, you had a chance yesterday to fill out a questionnaire—or Monday. Excuse me. You were asked your feelings about the death penalty on that questionnaire. If you would, I'd like you to tell us in your own words, number one, how you feel about the death penalty and, number, two, how you feel about your ability to serve on a jury like this where you may have to make this life or death decision?

A First of all, I am not totally in [2991] favor of the death penalty. I feel that it has been reinstated because of the overcrowding that we have in the jail situation now. I can't honestly say that I would be able to sentence another human being to death. I just don't think I could live with myself knowing --

MR. CUNNINGHAM: Your Honor, we can't hear.

MS. BAKER: What didn't you hear?

MR. WEST: The last part.

A Okay. I don't think that I could live with myself knowing that I had sentenced someone else to die. I mean, I was not there. I did not witness it. No matter what evidence you may bring before me.

Q Okay. Ms. Baker, I want you to understand one thing and that is no one is going to force you to serve on this jury. If you tell us that you can't do it because of the feelings you just expressed that you couldn't live with yourself, no one is going to force you to serve on this jury. The law requires you to come down here and make yourself available for us to talk and be what we call a

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[3748] answered that question. I would like to ask you, if you would, now that you've had a chance to sleep on it and think about it some more to tell us in your own words, first of all, how you feel about the death penalty and whether it serves a purpose and, secondly, how you feel about your ability to serve on this type of a jury?

A Well, as you know I circled both yes and no. I suppose I feel that the death penalty should be the very last resort. It would have to be a very clear-cut case where it was premeditation, obvious premeditation, and a very deliberate and cold-blooded act.

Q Do you feel then that the death penalty in some circumstances serves a purpose in our society?

A Yes, I do. I think it would keep someone from doing it again, protects society.

Q Do you feel like you're the type of person who can serve on a jury where the death penalty is one of the potential punishments?

A Again, it would depend on the circumstances. I think I could make the

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[3949] people have strong feelings, obviously, one way or the other. Do you see what I'm getting at?

A Yes.

Q We want to know how you feel about it ultimately and I'm going to stop talking here in just a minute and let you tell us how you feel personally about the death penalty, for one, and capital punishment and then secondly, your ability to actually serve on this type of a jury or to not serve. You've been asked this question, number fifty-six, and you said "Thou shall not kill"; is that correct?

A That's correct.

Q That's the way you felt Monday when you came down here?

A Yes.

Q Is that the way you feel now?

A Yes

A Yes

Q Just tell us a little bit more, kind of in your own words, how you feel about the death penalty.

A Well, I don't believe a person has the right to say who should be killed and who shouldn't going by what the crime is. Like I

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[4110] very serious case where the stakes are as high as they are, is your opinion. I know you were asked this question about the death penalty here, number fifty-six, "Do you believe in the death penalty?" Originally you circled yes and then you wrote no and you cross out your answer and you wrote "No one has the right to take another one's life." Why don't you just tell us in your own words—you've had a couple of nights to think about it and mull it over in your mind—how you feel about the death penalty and capital punishment generally speaking and then secondly, how you feel about your ability to actually serve on this type of a case and actu-

ally participate in that decision-making process where someone such as the Defendant would be executed?

A My honest opin—I don't believe in capital punishment. Like I said on there, I don't believe anyone has the right to take another person's life. If he committed a crime and if he is convicted and it's proven without a shadow of a doubt, as you say, then, yes, I believe he should be punished. He should be rehabilitated or whatever can be done, but I

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[4307] That man right down there will be taken into the death house. He will have an IV put into his arm and they will start what they call a saline solution in that IV. As he lays there, at the appointed time, a doctor will put a lethal substance into that IV and that substance will be injected into his veins until he dies, until the life is gone from that man sitting right down there, Thomas Joe Miller-El.

I'm not trying to draw horrible pictures or anything, but at some point we anticipate that is going to happen. The jurors that render that verdict are going to have a part in that. Now, I feel like it is only fair that you know that's our position and that's what we anticipate.

Now, on Monday you had a chance to fill out a questionnaire. It's very lengthy and we've gone over those. The one question I want to focus on at least right now is question number fifty-six, "How do you feel about the death penalty?" You answered it. You said, "It's not for me to punish anyone.", I believe are the words you used on it. You've had a couple of three days to sleep on it now and to [4308] think about it. I would just like you to tell us, if you would, in your own words what your feelings are about the death penalty and whether it serves a purpose in our society?

A Well, I still think it's not for me to decide.

Q Okay. Let me go a little bit farther. As I said, we still need two more people to serve on this jury. People who

are going to serve on this jury are going to have to decide after hearing the evidence.

A Yes.

Q First of all whether he's guilty or not guilty and second whether he's going to receive the death penalty or not. We don't want, Ms. Keaton, twelve blood-thirsty people jumping up and down to give this guy the death penalty. That's not the way it's going to work. That's not what we're going to have. What we do need, both sides need, is twelve people who feel that they can make the decisions that need to be made. If the evidence shows that he's guilty, they will find him guilty. If the evidence shows that he is not guilty, they will find him not guilty. If

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[4314] A Can I say something?

Q Sure.

A This is me. I wouldn't even think of killing anybody unless I was trying to save myself.

THE COURT: That's what we need to know, Ms. Keaton, just that kind of thing. How you feel, which way you feel, is important and I think the lawyers would agree. We care how you feel, but we don't care which way you feel. In other words, we just need to know how Ms. Keaton feels about any of these questions including that. I think that's what the lawyers are asking and maybe sometimes they ask it a little different than maybe I would or the other lawyers would, but that's just the way lawyers are. We ask questions different ways at different times, but as long as you tell us how you feel about these things, that's really all

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[4542] Q For certain types of cases?

A Yes.

Q I gather from what you're saying, if you were on this jury, you would take any case or any capital murder case

strictly on a case by case basis and judge that case on its face as presented. The reason I say that is, you said that you have certain things in your mind, for example, that you would want to hear, is that correct, before you feel the death penalty would be justified?

A Yes.

Q In other words, you said for repeat offenders?

A Right. In other words, like if someone goes out and commits a murder and it's his first offense, I do not think he should have the death penalty imposed upon him, but if he goes to jail, serves time—if he gets out and he does it all over again and he's just a menace to society, yes.

Q In other words, you're talking about a continuing course of criminal conduct, serious type of criminal conduct?

A Right.

* * * *

[4561] cared less? Do you see what I'm getting at?

A Yes.

Q Allowing that you could hear all that sort of evidence in the first part of the trial when you learn all the dynamics and the full spectrum of behavior, do you think you could learn enough about an individual where you feel you could answer that question yes, this is the type of individual based on what I've learned about him so far that would probably commit some criminal acts of violence in the future?

A No, I can't say I could answer that.

Q Any particular reason?

A Well, the evidence would have to be awful strong. People change, so I can't really say I could answer that.

Q Let me just ask you --

A I could the past, but I couldn't the future part of it.

Q Let me just ask you this: What would be most valuable to you—what would you want to know about somebody to enable you to answer that question yes?

* * * *

[4581] A I think it's just putting away a person that really does not belong in our society at all. May I give an example here?

Q Yes, ma'am.

A There was a case not long ago in University Park to where a man posing as a lady scalded—well, you probably know about this—a four month old baby from its waist down. I saw these pictures and he was sentenced to life and my own opinion is that he should have had the death penalty.

Q Because of what he did to that child?

A Right—well, the child ended up dying. It couldn't possibly have lived. That's how I formed my decision.

Q I believe you indicated to Mr. Macaluso that where a person commits murder or a person severely tortures another person or extreme child abuse, that person who commits those offenses should receive the death penalty?

A Yes, sir.

Q You believe that strongly and you have believed that at least for a period of

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[4583] commits that type of offense or a person who severely tortures another person which leads to that person's death is not punishable by the death penalty?

A Yes, sir.

Q Also, a person who is guilty of extreme child abuse, that in and of itself is not punishable by the death penalty under our statutes, but you believe the person who does that should receive the death penalty; is that correct?

A Yes, sir.

Q And you believe regardless of what the statute says that the range of punishment is for a person who commits murder or a person who severely tortures another or extreme child abuse, you still believe that person should receive the death penalty?

A Now --

Q Because of the facts involved with respect to those types of offenses?

A I can't really say that. I think when a murder is committed, whether it is purposely or—a sixteen year old boy or something, this is his first offense, no, I do [4584] not believe in the death penalty there. I think that he ought to be given a chance to have rehabilitation.

Q You've added another factor, the factor of age.

A Right. I pointed that other example out because it was a man doing that to a four month old baby who could not defend itself or anything. When there are adults involved, two adults involved that are responsible per se, especially for their own actions—I shouldn't have pointed that out. I'm getting all confused. In other words, I do not believe in the death penalty on first offense murder unless it is a child involved, a defenseless child. I'm getting myself all mixed up. I'm embarrassed.

Q As I said earlier, you cannot give a wrong answer. It tells us how Ms. Hearns feels. If I understand what you're saying, a person who commits the offense of murder for the first time, it is your belief that person should not receive the death penalty; is that correct?

A Yes, sir.

[4585] Q Regardless of what the facts are, regardless of what the circumstances are?

A Yes.

Q However, in an instance where a young child is involved and you added defenseless, it is your feeling that the

person who commits that offense against that child and that child dies, then the person should receive the death penalty?

A Yes, sir.

Q Even though the law says the person cannot receive the death penalty?

A Yes, sir. I still believe that, which makes no sense, I know.

Q Would you be able to put out of your mind and if you had that type of case that you have designed and you have indicated, just put your personal feelings aside and decide that case based upon the facts and circumstances and, if you believe that the proper punishment from the facts and circumstances called for ninety-nine years, could you give ninety-nine years?

A You're talking about the child?

Q Yes, ma'am.

* * * *

[4599] keeps repeating the—doing awful acts to society.

Q With respect to where you said if a person—I think you had said where a person commits murder for the first time, you would not give him the death penalty?

A No—well, no, I wouldn't.

Q Except in one isolated instance that you referred to?

A Right.

Q If you found a person guilty beyond a reasonable doubt of capital murder and you were back there answering the—trying to answer question number two and the evidence had shown you that person had no criminal record, you have no past history. All you have is what you heard in the first part of the trial. Could you answer question number two?

A Well, I would say no, but I would answer it.

THE COURT: You would answer it no?

A Wait.

THE COURT: I just want to know what your answer was.

[4600] A I would answer it no.

Q You would answer it no?

A Yes—the key word in that question number two is continuing and how can you say a first offender of a capital murder will be a continuing threat to society?

Q In other words, you're saying—and I don't want to put words in your mouth—that a person with no prior history cannot be a continuing threat to society?

A I don't think so.

Q In question number thirty-seven you were asked "Do you have any prejudice for, against, or fixed opinions concerning psychiatric or psychological testimony?" You answered yes. Is it for or against?

A I would say both for and against according to the situation. I think that sometimes people bring in a psychiatrist or a psychologist to tell the jury and—well, anyone in the courtroom that this person is mentally incompetent when in actuality they're not and then it works the other way, too. I don't put much store in that.

A Are you saying you don't put too

* * * *

[4617] convinces you beyond a reasonable doubt that they ought to be answered yes and, if they do that, then you answer them yes and the result follows.

Now, you said—and I heard it one way and maybe you said it another way and maybe the lawyers heard it still a third and fourth way. I understood you once to say that for a first offender, you couldn't assess the death penalty. I think you said words to that effect.

MS. HEARN: Right.

THE COURT: Let me put that belief of yours aside. That's fine and I'm not quarreling with you. However, in a

capital murder case, if you have found a defendant guilty of capital murder, the law permits these things to occur. This is the evidence that the jury would be allowed to base its answers to one [4618] and two on. It may of course consider the evidence in the first phase of the case that it heard when it found the defendant guilty of capital murder to start with which is—you've heard it explained several ways—knowingly or intentionally causing the death of another individual in the course of committing another felony, so you found the defendant guilty of murder plus an attempted commission or a commission of another felony.

Now, in a capital murder case there is a punishment hearing following the guilt or innocence phase of the case just as there is in any criminal case in Texas. A burglary case has a punishment hearing. A DWI case has a punishment hearing. They all have punishment hearings. At that punishment hearing, both sides are entitled to bring [4619] additional evidence before the jury to help them answer these questions. Neither side has any responsibility to do so and particularly the defendant doesn't have to do anything at all, if he doesn't want to. He may or he may not, but he doesn't have to bring anything and the State does not either. I can't tell you at this point in time whether or not you will hear any additional evidence.

If you did not hear any additional evidence or based on what you heard could you take the oath that if you had, found a defendant guilty beyond a reasonable doubt and you went out and deliberated on one and two, if the evidence to number two showed you beyond a reasonable doubt that it ought to be answered yes from everything you had heard in the case, could you answer it yes?

MS. HEARN: Yes, if the [4620] State proved that he would be a continuing threat to society.

* * * *

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IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

JANIE COCKRELL,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. and the LEAGUE OF WOMEN VOTERS OF THE UNITED STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The NAACP Legal Defense and Educational Fund, Inc., (LDF) is a non-profit corporation formed to assist African-Americans in securing their rights by the prosecution of lawsuits. Its purpose includes rendering legal aid without cost to African-Americans suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own. For many years, its attorneys have represented parties and it has participated as *amicus curiae* in this Court, in the lower federal courts, and in state courts.

The LDF has a long-standing concern with the influence of racial discrimination on the criminal justice system in general, and on jury selection in particular. We represented the defendants in, *inter alia*, *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972) and *Ham v. South Carolina*, 409 U.S. 524 (1973); pioneered in the affirmative use of civil actions to end jury discrimination, *Carter v. Jury Commission*, 396 U.S. 320 (1970), *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as *amicus curiae* in *Batson v. Kentucky*, 476 U.S. 79 (1986), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), and *Georgia v. McCollum*, 505 U.S. 42 (1992).

The League of Women Voters of the United States is a nonpartisan, community-based political organization that encourages the informed and active participation of citizens in government and influences public policy through education and

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[1] Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief.

advocacy. The League is organized in one thousand communities and in every state, with more than 120,000 members and supporters nationwide.

Founded in 1920 as an outgrowth of the 72-year struggle to win voting rights for women in the United States, the League has always worked to promote the values and processes of representative government. Working for open, accountable, and responsive government at every level; assuring citizen participation; and protecting individual liberties established by the Constitution – all reflect the deeply held convictions of the League of Women Voters.

The League of Women Voters believes that democratic government depends upon the informed and active participation of its citizens. Racial discrimination to block citizen participation in government offends the core values of the League and the American system of representative government. We believe that no person should suffer the effects of legal or administrative discrimination. The League participated as *amicus curiae* in *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127 (1994), the case that prohibited the exercise of peremptory challenges based on the gender of the juror.

The question before this Court – whether the lower courts erred in failing to find a violation of *Batson* when presented with overwhelming evidence that prosecutors had used race-based peremptory challenges systematically to exclude African-Americans from the jury which convicted and sentenced the African-American petitioner to death – presents an important issue concerning the administration of criminal justice. *Amici* believe their experience with the issue of racial discrimination in jury selection has yielded lessons that could be useful to the Court in resolving this appeal.

SUMMARY OF THE ARGUMENT

Justice and the perception of justice in the criminal justice system are essential to the maintenance of order in a democratic society. Functionally and symbolically, juries stand as a safeguard against the State's misuse of its powers to confine or execute its citizens. Racial discrimination in the selection of juries injures not only the defendant and the African-American citizenry who are excluded from service, but the entire community. Cynicism and disrespect for the law are the predictable results when courts condone blatant discrimination in the courtroom.

The facts of this case present an egregious example of just the type of government manipulation of the jury that denies justice and breeds disrespect for the law. The Dallas County District Attorney's office routinely and deliberately excluded African-Americans from jury service through peremptory strikes at the time this case was tried and in preceding years. The prosecutors followed this practice in choosing the jury in this capital case. State courts found that the same prosecutors who systematically struck African-Americans from the jury in this case had discriminated in the same way in other trials both before and after petitioner's trial. Yet instead of putting the prosecutors' strikes in context and weighing their assertions of racial neutrality against evidence that bespeaks discrimination, the courts below refused to consider such evidence.

The record here makes clear that this Court's determination to end invidious racial discrimination in the selection of juries remains unfulfilled in some jurisdictions. To assure that there is an adequate and certain check on the biased use of peremptory challenges to exclude African-Americans from juries, the Court needs to restate what would seem a self-evident proposition: — that in determining whether invidious

racial discrimination has occurred, judges must consider all of the facts and circumstances that might shed light on the issue.

ARGUMENT

I.

The Practice of Excluding African-Americans from Juries Undermines Justice and the Appearance of Justice

A. The Crucial Role of Juries in a Democratic Society

This case is of great significance because juries are both a real and symbolic bulwark against the State's misuse of its powers to confine or execute its citizens. "The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge." *Batson*, 476 U.S. at 86. It is "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge," *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968), "a prized shield against oppression," *Glasser v. United States*, 315 U.S. 60, 84 (1942), that "fence[s] round and interpose[s] barriers on every side against the approaches of arbitrary power," *id.* at 84-85.

The jury also serves as the defendant's primary protection against the invidious influence of race in the decision whether he lives or dies. "[I]t is the jury that is a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.' *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880). Specifically, a capital sentencing jury representative of a criminal defendant's community assures a '"diffused impartiality,"' *Taylor v. Louisiana*, 419 U.S. 522,

530 (1975) (quoting *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)), in the jury's task of 'express[ing] the conscience of the community on the ultimate question of life or death,' *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968)." *McCleskey v. Kemp*, 481 U.S. 279, 310 (1987) (footnotes omitted); see also *Turner v. Murray*, 476 U.S. 28, 35 (1986) ("Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. . . .The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence.").

The risk of error in capital cases is not theoretical. Racial prejudice can influence jurors' determinations not only on the ultimate question of life and death, but on the issue of guilt itself. "It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence." *Georgia v. McCollum*, 505 U.S. at 69 (O'Connor, J., dissenting). "[R]acial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' *Rose v. Mitchell*, 443 U.S. 545, 556 (1979), and places the fairness of a criminal proceeding in doubt." *Powers v. Ohio*, 499 U.S. 400, 411 (1991).

B. Race-Based Exclusions Harm Jurors as Well as Defendants

As this Court has made abundantly clear, the harm from discriminatory exclusions of African-American jurors is not to the defendant alone. When particular segments of the community are excluded from serving on juries, they are excluded from participating in an institution that stands at the heart of our democracy. To be told that you are unfit because

of your race to judge your fellow citizens is to be told unequivocally that you are a second-class citizen. Your voice is not considered to be a voice of common sense to be interposed between the government and the accused. Your intelligence, your ability to be fair, your life experiences, your understanding of your society, and your integrity are all denigrated. "People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion." *Carter v. Jury Commission*, 396 U.S. 320, 329 (1970).

"'The jury system postulates a conscious duty of participation in the machinery of justice. . . . One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse.'" *Powers v. Ohio*, 499 U.S. at 406 (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922)). For people who are excluded from jury participation, there is no such security, but doubt and mistrust that the system is functioning in a fair and impartial manner.

The fact that prosecutors have long used peremptory challenges to purge juries of African-Americans is not news in the African-American community. When an African-American is struck from a jury, he or she is aware that the strike may be racially motivated. "[T]he injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself," *Edmonson v. Leesville Concrete Co.*, 500 U.S. at 628, the place where even-handed justice is supposed to reign. When the exclusion comes not just in a governmental forum, but at the instance of the government's representative himself, the injury is further compounded.

Such exclusions have led to the belief that what occurs in the courthouse is not justice, but "white man's justice."[2] Indeed, African-American citizens interviewed by the Dallas Morning News at the time of Petitioner's trial spoke of the injury such discrimination causes. "Blacks called for jury service say the absence of blacks on juries causes them to question whether the judicial system is color-blind." *Id.* One such potential juror said she felt "intimidated" after she and five other African-American jurors were eliminated by the State, resulting in an all-white jury. *Id.* A former prosecutor and Dallas county's first African-American judge said, "[A]s honest, law-abiding citizens who believe in God and the American way and pay our taxes to send our children to school, we're still told we're not anything of value." *Id.*

C. Racial Discrimination in Jury Selection Discredits the Entire Judicial System

Society has a paramount interest in maintaining confidence in its criminal justice system. A democratic society depends on the shared belief of its members that the system is fair and impartial, that verdicts are objective and reliable, and that punishments meted out are punishments deserved. "Wise observers have long understood that the appearance of justice is as important as its reality." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. at 155 (Scalia, J., dissenting).

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[2] *See, e.g.*, Steve McGonigle, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds* DALLAS MORNING NEWS, March 9, 1986 at A1, Cert. App. 11, at 8 ("Many families of defendants leave the courtroom believing they have witnessed 'white man's justice,' said Peter Lesser, a defense attorney and a Democratic candidate for district attorney.") [Citations to items in the Appendices to Petition for Writ of Certiorari appear in the form, "Cert. App. [number of appendix], at [page number.]"

It is not only African-Americans who equate racial discrimination in the courtroom with a denial of justice. This Court has repeatedly observed that "[r]ace discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system, and prevents the idea of democratic government from becoming a reality." *Rose v. Mitchell*, 443 U.S. at 556.

Indeed, one of the strongest and most enduring symbols of injustice in this country is the trial of an African-American defendant by an all-white jury. "To Kill a Mockingbird,"[3] although a work of fiction,[4] seared into the American consciousness the grim reality of inequity in racially exclusionary tribunals. Although that story took place in 1930s America, the all-white jury is, unfortunately, not a relic of an unenlightened past,[5] nor is it perceived to be. Rubin

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[3] HARPER LEE, TO KILL A MOCKINGBIRD 233 (1960); *see also* Tim Dare, *Lawyers, Ethics, and To Kill a Mockingbird*, 25 PHILOSOPHY AND LITERATURE 131 (2001) ("These courts were governed not by presumptions of equality and innocence, but by prejudice and bigotry. Atticus's plea to the jury had been ignored and Tom had been convicted and killed as a result."). More recent works of fiction that have included the theme of the biased all-white jury include STEPHEN KING, THE GREEN MILE (1997).

[4] Although fiction, the book in fact was influenced by historical events. *See* Carroll Van West, *Perpetuating the Myth of America: Scottsboro and its Interpreters*, SOUTH ATLANTIC QUARTERLY, 36-48 (Winter 1981) (indicating To Kill A Mockingbird was strongly influenced by the Scottsboro case and the Emmett Till murder); *see also* Patrick Chura, *Prolepsis and Anachronism: Emmett Till and the Historicity of* To Kill A Mockingbird, SOUTHERN LITERARY JOURNAL, 1-26 (Spring 2000).

[5] For example, a recent study by the Chicago Tribune found that 22% of all African-Americans sentenced to death in Illinois between 1977 and the time of the survey in November, 1999 were condemned by all-white juries. Ken Armstrong & Steve Mills, *Death Row Justice Derailed*, CHI. TRIB., Nov. 14, 1999, Sec. 1, p. 16.

"Hurricane" Carter's conviction by an all-white jury was the subject of both a popular song (*Hurricane*, co-written and performed by Bob Dylan),[6] and a recent movie (THE HURRICANE (Paramount Pictures 1999)).

There continues to be widespread public suspicion about the fairness and accuracy of verdicts in criminal cases where all-or nearly all-white juries are impaneled in communities with significant minority populations.[7] As Justice Thomas noted

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[6]

Here comes the story of the Hurricane,
The man the authorities came to blame
For somethin' that he never done.
Put in a prison cell, but one time he could-a been
The champion of the world.

* * *

And though they could not produce the gun,
The D.A. said he was the one who did the deed
And the all-white jury agreed.

* * *

To see him obviously framed
Couldn't help but make me feel ashamed to live in a land
Where justice is a game.

(*Hurricane*, by Bob Dylan and Jacques Levy Copyright © 1975 Ram's Horn Music).

[7] The insidious history of white juries sitting in judgment of black defendants represents only part of the basis for the pervasive distrust of unrepresentative juries. On the other side of the coin are cases in which white juries have acquitted white defendants accused of crime against African-Americans, like the famous murders of Emmett Till and Medgar Evers, and many others whose names never became known beyond their own small towns. When Byron De La Beckwith was re-indicted and, in 1994, finally convicted of murdering Medgar Evers, news reports and editorials concerning the conviction highlighted the fact that the verdict was returned by a mixed jury, a sign of social progress. *See, e.g., Belated Justice in Mississippi*, THE BALTIMORE SUN, Feb. 8, 1994, at 14A ("De La Beckwith was tried twice by all-white juries during the 1960s, with both

recently, "the public, in general, continues to believe that the makeup of juries can matter in certain instances. Consider, for example, how the press reports criminal trials. Major newspapers regularly note the number of whites and blacks that

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cases ending in hung juries. This time, eight of the 12 jurors were black– a direct result of the civil rights movement Mr. Evers gave his life for– and their decision carried a measure of credibility that all previous proceedings lacked."); *After 30 Years, Conviction in Medgar Evers' Murder Case* (ABC NEWS, Feb. 5, 1994) ("A racially mixed jury did today what two all-white juries refused to do more than a generation ago: they convicted a white man, a segregationist . . . Byron De La Beckwith, of the crime."); Bill Berlow, *Beckwith's Old Story Sheds Light On Today's Racial Mistrust*, THE TALLAHASSEE DEMOCRAT, Jan. 26, 2001, at A1; Christina Cheaklos, *Mississippi's 30-Year Murder Mystery*, THE ATLANTA JOURNAL AND CONSTITUTION, Feb. 5, 1994, at A1 ("Today, the jury deciding Beckwith's fate is made up of eight blacks and four whites, testament to the change since two all-white juries failed to reach verdicts in 1964."). Despite the progress signaled by the Evers case, juries that *excluded* African-Americans were, at the same time, prominent in the news. The Rodney King case is a prime example. The jury which presided over the trial of the officers was composed of ten whites, one Asian-American, and one Latina. *See* Richard A. Serrano & Carlos V. Lozano, *Jury Picked for King Trial; No Blacks Chosen*, L.A. TIMES, Mar. 3, 1992, at A1, A19. On April 29, 1992, the jury acquitted police officers charged with beating King of all charges. The outcome shocked people throughout the nation, who had viewed a videotape of the beating on television. Riots erupted all over Los Angeles in large measure because the public perceived the jury, devoid of African Americans, as lacking legitimacy. *See* Robert Reinhold, *After the Riots: After Police Beating Verdict, Another Trial for the Jurors*, N.Y. TIMES, May 9, 1992, at A1; see *also* Tanya E. Coke, *Lady Justice May Be Blind, But Is She A Soul Sister? Race-Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327 (May, 1994) ("Conventional wisdom has it that Los Angeles burned in the spring of 1992 because of a damning videotape and a verdict of not guilty. The more precise source of public rage, however, was that the jury which acquitted four white police officers of beating black motorist Rodney King included no African Americans."). The King verdict cemented in the minds of many the idea that even at the end of the Twentieth Century, jury exclusion and racially-biased verdicts were a reality.

sit on juries in important cases. Their editors and readers apparently recognize that conscious and unconscious prejudice persists in our society, and that it may influence some juries. Common experience and common sense confirm this understanding." *Georgia v. McCollum*, 505 U.S. at 61 (Thomas, J., dissenting).[8]

For all these reasons, state conduct that unlawfully manipulates a jury in a capital case so that minority juror participation is either token or non-existent raises profoundly important issues.

II.

The Lower Courts' Refusal to Recognize Discrimination in This Case Flouts This Court's Mandate to End Race Discrimination in Jury Selection

This case presents not only strong proof that intentional discrimination marred the selection of petitioner's jury but also a disturbing scenario of the lower courts' ignoring both this evidence and controlling law in concluding that no Equal Protection violation occurred.

A. From *Strauder* to *Batson*: The Struggle to End Governmental Exclusion of African-Americans from Jury Service

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[8] In the five years after this Court's decision in *McCollum*, (from June 1, 1992 to June 1, 1997) a computer search found virtually the same number of references to "all-white" jury (192) in the New York Times, the Chicago Tribune and the Los Angeles Times as Justice Thomas did at the time of *Batson*. In the succeeding five years (June 1, 1997 to April 8, 2002) that number was reduced, but remained substantial (114).

Since the adoption of the post-Civil War amendments promising equal protection of the laws to the newly-freed slaves, race-based exclusion from juries has been used to eviscerate that promise. It has undermined both justice and the perception of justice. As old, more direct methods of racial discrimination were held unlawful, new, more subtle ones took their place. Explicit laws forbidding African-Americans to sit on juries, *see, e.g., Strauder v. West Virginia*, 100 U.S. 303, were replaced with a variety of discretionary systems that enabled officials to exclude African-Americans simply by refusing to select them for venires. After the Court repeatedly made clear that exclusion from venires by any means -- whether by statute or practice -- would not be tolerated, *see, e.g., Avery v. Georgia*, 345 U.S. 559 (1953); *Whitus v. Georgia*, 385 U.S. 545 (1967), officials determined to prevent African-Americans from actually serving on juries turned to the peremptory challenge. *Batson v. Kentucky*, 476 U.S. 79 (1986).

At each step along this path, officials have continually asserted that the absence of African-Americans from juries was not the result of purposeful discrimination, but was based on lawful reasons: there were no qualified African-Americans, *Neal v. Delaware*, 103 U.S. 370 (1880); none who qualified were known to State officials charged with composing venire lists, *Norris v. Alabama* 294 U.S. 587 (1935); their views and beliefs made them less impartial, and thus legitimately subject to peremptory strikes, *Swain v. Alabama*, 380 U.S. 202 (1965).

With regard to exclusion from jury lists and venires, this Court rejected such views and held repeatedly that assertions that African-Americans were universally unfit for jury service — or nearly so — were nothing more than expressions of racial prejudice. *See, e.g., Norris v. Alabama*, 294 U.S. 587. Even in the face of sworn testimony from state trial judges, jury commissioners and other officials found "credible" by state court judges, the Court made clear that it would not turn a blind eye to the truth of racial prejudice and

discrimination that permeated American life and the American court system. "[A] finding of no discrimination was simply too incredible to be accepted by this Court." *Hernandez v. New York*, 500 U.S. 352, 369 (1991).

In the course of these "unceasing efforts to eradicate racial discrimination," *Batson*, 476 U.S. at 85, however, the Court stumbled. When it held in *Swain* that only proof of systematic and complete exclusion of African-Americans from juries over an extended period of time would suffice to prove intent to discriminate in the use of peremptory challenges, it erected what proved to be an insurmountable burden of proof. For the next twenty years, racial discrimination remained a notorious feature of jury selection in many American courtrooms.[9] The fact that African-Americans were virtually openly excluded from participation in a system of justice purporting to promise equality and fairness bred cynicism and distrust.

When this Court decided *Batson*, its manifest intent was to bring to an end – once and for all – these practices and to restore integrity to the system. Those harmed by discriminatory peremptory striking could now prove their cause without need to conduct an exhaustive investigation into numerous other

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[9] This is demonstrated by successful *Swain* challenges in the late 1980's and the 1990's. *See, e.g., Horton v. Zant*, 941 F.2d 1449, 1455-60 (11th Cir. 1991)(*Swain* test satisfied where evidence showed prosecution struck 90% of African American jurors in capital cases in addition to other evidence showing prosecutor took steps to lessen minority participation in jury system); *Miller v. Lockhart*, 65 F.3d 676, 680-82 (8th Cir. 1995)(*Swain* test satisfied where prosecutor used ten strikes against African American jurors in instant case and other evidence showed African Americans excluded peremptorily in large numbers in five year period preceding Miller's trial); *Jones v. Davis*, 835 F.2d 835, 838-40 (11th Cir. 1988)(testimony of six practicing attorneys showed black jurors routinely struck by prosecutors in jurisdiction; *Swain* standard satisfied).

cases. The pervasive exclusion of African-Americans from juries — known to all but not "provable" in the courts — was to cease.

But cases like petitioner's show why it has not ended and will not end without this Court's decisive intervention. "Those of a mind to discriminate"[10] found the Achilles heel in *Batson*, the mask behind which continued discrimination could hide — the "facially neutral" explanation for a peremptory strike. In too many cases, African American jurors continued to be excluded in large numbers, and some trial and appellate courts not only credited nearly any reason given by the prosecution as a purportedly race-neutral justification but also held that it trumped all other proof suggesting racial discrimination.[11] It is clear to us that the trial bench and reviewing courts need a clear admonition from this Court that a facially neutral explanation for a strike may be a necessary but is not a sufficient defense in the face of strong evidence of purposeful racial discrimination.[12]

B. The Evidence of Purposeful Discrimination in this Case is Overwhelming

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[10] *Batson*, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. at 562).

[11] See *infra* pp. 21 - 23.

[12] This case is distinguishable from *Purkett v. Elem*, 514 U.S. 765 (1995)(per curiam), wherein the Court addressed the prosecutor's burden of production at stage two of the three-step *Batson* inquiry, as well as the issue of the deference a federal habeas court must extend to state court fact-finding on the credibility of such offerings. This case does not concern those questions but rather presents only the question of the scope of evidence the court must consider at stage three after the prosecution has met its stage two burden of production.

In our view, it is hard to imagine a case with stronger proof that a prosecutor intended to discriminate, absent an explicit confession from the prosecutor. Without rehashing in detail all of the evidence produced below, which will be presented in petitioner's brief, it is important to summarize the evidence:

1. The office of the prosecutor made it an explicit policy to exclude African-Americans from juries, evidenced in its training manual, memos used in training, and the testimony of former prosecutors.[13]

2. The office had a history of vastly disproportionate exclusion of African-Americans from both felony and capital juries. Uncontroverted evidence showed that in a study of 100 randomly selected felony trials between 1983 and 1984 (shortly before petitioner's trial), 405 of 467 (87%) of African-Americans qualified to serve were excluded *by prosecutors using peremptories*. African-Americans were excluded from juries at almost five times the rate of whites. Eighty percent of African-American felony defendants were tried by all-white juries. Although African-Americans comprised 18% of the county, they were less than 4% of jurors. 72% of juries had no

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[13] Although written in the late 1960s, the memo which was incorporated into the manual is known to have remained in the manual at least as late as the early 1980s. *Ex parte Haliburton*, 755 S.W. 2d 131, 133 n. 4 (Tex. Crim. App. 1988). The manual stated: "Who you select, and what you qualify the panel on will depend on the type of crime, the age, *the color* and sex of the Defendant . . ." Cert. App. 8, at 301 (emphasis added). "You are not looking for any member of a minority group which may subject him to oppression." *Id.* at 303. An earlier version used more straightforward and offensive language, calling for the exclusion of "Jews, Negroes, Dagos, Mexicans, or a member of any minority race." Cert. App. 11, at 100. That the policy was still in effect at the time of petitioner's trial was shown by the contemporaneous testimony of judges and lawyers who said it was widely known in the local legal community that the Dallas County district attorneys used peremptory strikes to exclude African-Americans.

African-Americans. A qualified African-American had only a one in ten chance of serving on a jury, while a white had a one in two chance.[14]

In a study of capital trials in Dallas County from 1980 - 1986, the evidence, again uncontroverted, showed that of 180 jurors in 15 trials, only 5 (3%) were African-American. Of the remaining 57 African-Americans qualified to serve, 56 (98%) were excluded *by prosecutors using peremptory challenges*. Four of the five African-Americans sentenced to death were sentenced by all-white juries. Qualified African-Americans had a one in twelve chance of being selected for a jury, while whites had a one in three chance.[15]

3. The prosecutors used 10 of 14 peremptory challenges to exclude 91% of qualified African-Americans from petitioner's jury. Cert. App. 5, at 6.

4. The specific prosecutors who exercised the challenges at issue in petitioner's case were found to have intentionally discriminated in other trials preceding and following this case. *Chambers v. State*, 784 S.W.2d 29 (Tex. Crim. App. 1989); *(Dorothy Jean) Miller-el v. State*, 790 S.W.2d 351 (Tex. App. - Dallas 1990, pet. ref'd).[16]

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[14] See Steve McGonigle, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds* DALLAS MORNING NEWS, March 9, 1986 at A1, Cert. App. 11, at 1.

[15] See Ed Timms & Steve McGonigle, *A Pattern of Exclusion: Blacks Rejected from Juries in Capital Cases*, DALLAS MORNING NEWS, Dec. 21, 1986 at A1, Cert. App. 13, at 36.

[16] The prosecutor in charge of jury selection had joined the District Attorney's office in 1973. He testified in *Chambers* that he had "never" stricken a potential juror solely on the basis of race. *Chambers v. State*, 784 S.W.2d at 31. The state court refused to credit this testimony.

5. The prosecutors acted to exclude African-Americans from petitioner's jury before they knew anything about them. Before a word of voir dire was uttered in this case, before juror questionnaires were even completed, the prosecutors attempted to reduce the number of African-Americans on the panel by "shuffling" the panels. When the permitted number of shuffles failed to achieve their goal, they requested an additional one, citing violation of a rule the trial judge had never seen cited, let alone enforced, in twenty-five years in the county. *See* V.D. Vol. IV 1792-93.

6. The prosecutors coded the jury cards in petitioner's case by race. *See* Supplemental Briefing on Batson/Swain Claim Based on Previously Unavailable Evidence (filed December 8, 1977), *Miller-El v. Johnson*, No. 3:96-CV-1992-H (N.D. Tex.), Exhibit 1, at 1-56.

7. The prosecutors questioned African-American jurors differently than white jurors in petitioner's case. *See Petitioner's Brief.*

8. The reasons that the prosecutors proffered for striking African-American jurors from petitioner's jury applied to white jurors who were not struck.[17]

C. The Lower Courts' Patently Inadequate Review

There is simply no way to accept as "reasonable" -- as did the lower courts -- the trial court's holding that there was no discrimination in this case. In early 1986, it was widely known that Dallas County prosecuting attorneys used peremptory challenges to keep African-Americans off juries, but the courts

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[17] Only these last two categories of evidence were contested by the State. *See* Petitioner's Brief for a detailed analysis of the voir dire.

apparently believed that *Swain* immunized their actions. Once *Batson* lifted that immunity, it was plain the courts could now provide relief to petitioner. But relief was not granted because the courts failed to apply the clearly established law requiring consideration of the compelling pattern and practice evidence in the record as bearing on the question whether petitioner had shown that the strikes constituted racially-biased conduct.

1. The State Court Decisions

The decision in *Batson* "requir[es] trial courts to be sensitive to the racially discriminatory use of peremptory challenges." *Batson*, 476 U.S. at 99. But sensitivity requires an open mind and an unflinching eye. Regrettably, in our view the trial court here displayed neither.

It is difficult to tell whether the trial judge simply misunderstood *Batson*, or was so unreceptive to a claim of racial discrimination that he refused to consider compelling facts in support of the claim.[18] Whatever the reason, the trial judge went so far as to hold, at the conclusion of the *Batson* remand hearing, that petitioner had failed to make out a *prima facie* case, even after the Texas Court of Criminal Appeals had

[18] At the conclusion of the original *Swain* hearing, after being presented with the training manual, the testimony of former prosecutors, the statistical evidence of exclusion, and testimony from judges and defense lawyers in support of the claim, the trial judge stated there was "*no evidence* presented to me that *indicated* any systematic exclusion of blacks as a matter of policy by the District Attorney's office." (Def. Exh. 1 at 146) (emphasis added).

explicitly held as a matter of law that one had been proven.[19] *Miller-El v. State*, 748 S.W.2d 459, 460 (1992).

At the *Batson* hearing, petitioner asked the trial judge to admit all of the evidence adduced at the pre-trial *Swain* hearing for consideration of the *Batson* claim. The State objected, arguing that all of the evidence of systematic exclusion should be excluded because it was now irrelevant: under *Batson*, the only evidence that was admissible was evidence about the individual trial in which the claim was raised. *See Respondent's Opposition to Writ of Certiorari* App. A, at 8-10. Neither office policy nor a pattern of behavior in prior or subsequent cases could be considered. Essentially, what this Court had intended as a relaxing of the *Swain* standard was turned on its head: although *Batson* held that difficult-to-obtain proof of complete and systematic discrimination was no longer

[19] The last section of the trial judge's opinion ("Findings of Fact and Conclusions of Law on Disputed Issues") is divided into two sections: "A. Prima Facie Case" and "B. Reasonableness of the State's Explanations." Under the "Prima Facie Case" section, the trial judge held: "The evidence did not even raise an inference of racial motivation in the use of the State's peremptory challenges." Reply to Respondent's Brief In Opposition, App. 1, at 4. In an introduction to the "Reasonableness of the State's Explanations" section, the trial judge wrote, "Because this court does not wish to unduly delay the progress of the appeal of this case, it required the State to produce explanations for the exercise of all of her [sic?] peremptory challenges, notwithstanding the court's belief in the correctness of its ruling on the prima facie showing issue." *Id.*, at 6. It also appears that the trial judge collapsed the first and second steps in *Batson*, allowing the prosecutor's "race neutral" explanations to negate a finding of a *prima facie* case. The trial judge cited a 1987 opinion from the Supreme Court of Missouri which seemed to endorse such a procedure, directing trial judges "to consider the prosecutor's explanations as part of the process of determining whether a defendant has established a prima facie case of racially discriminatory use of peremptory challenges." *Id.* at 5 (*citing State v. Antwine*, 743 S.W.2d 51, 64 (Mo. 1987) (*en banc*)).

required to prove discrimination in an individual case, the State contended that *Batson* barred the petitioner from using evidence of systematic discrimination as proof of discrimination in an individual case involving the same actors.

The state trial judge admitted the evidence "in an abundance of caution" but made clear that he was not required to give it any weight whatsoever in his decision *See Respondent's Opposition to Writ of Certiorari* App. A, at 11. His written decision recites the evidence he considered — the "raw numbers" of strikes used (which he believed were counterbalanced by the fact that one African-American was allowed to sit); the "entire voir dire process" and "the explanations for the [strikes] . . . offered at trial and at the retrospective *Batson* hearing." Reply to Respondent's Brief In Opposition, App. 1, at 5. The pattern and practice evidence is omitted from the list, and not mentioned anywhere else. Thus, all the information about who the actors were, what they had been doing, and the impact of those actions vanished. Viewing the case in total isolation, the trial judge concluded that no discrimination had occurred.

On appeal, the Court of Criminal Appeals looked at the record to determine whether the prosecutor had, as the trial court found, proffered facially race-neutral explanations for the strikes of African-Americans. Since it found that he had, and there was support in the record for those explanations, the Court of Criminal Appeals went no further. The reality of what everyone knew had occurred in Dallas County in the 1980s simply dropped out of the case. The Court of Criminal Appeals did not even acknowledge that the trial judge had completely ignored its own finding that petitioner had proven a *prima facie* case of discrimination. *Miller-el v. State*, No. 69-677 (Tex. Crim. App. Sept. 16, 1992).

2. The Federal Court Decisions

The federal district court and the Fifth Circuit both relied on the Findings and Recommendation of the United States Magistrate Judge. *Miller-el v. Johnson*, No. 3:96-CV-1992-H (N.D. Tex. June 5, 2000); *Miller-el v. Johnson*, 261 F.3d 445 (5th Cir. 2001). In that report, the Magistrate Judge began by noting that it would be "an understatement" to characterize the evidence supporting the *Batson* claim as "copious and multifaceted." Cert. App. 5, at 12. Elsewhere, he concluded that "Petitioner has adduced a considerable amount of evidence showing that the Dallas County District Attorney's office had an unofficial policy of excluding African-Americans from jury service in years past. *There is no other explanation* for the appalling statistics brought to light by the *Dallas Morning News* in March 1986." Cert. App. 5, at 20 (emphasis supplied). Nonetheless, because of his mistaken view of a proper *Batson* analysis, he recommended that relief be denied in this case.

The Magistrate Judge held that 1) evidence that the prosecutors were found to have discriminated in other cases is not relevant to whether they might be offering pretextual reasons for strikes in this case, but "is only relevant to determining whether petitioner has established a *prima facie* case under *Batson*;"[20] 2) evidence that the prosecutor systematically questioned African-American jurors differently than white jurors is irrelevant unless the specific line of

[20] The fact that the specific prosecutors whose intentions were being assessed had been found by other courts to have intentionally discriminated was not relevant, in his view, in determining whether their reasons for striking 10 African-Americans in petitioner's case were sincere or pretextual. Cert. App. 5, at 13.

questioning led to the exclusion of African-Americans;[21] and 3) in a disparate treatment analysis, if review of the voir dire of each struck African-American juror revealed some difference, no matter how minor, from comparable white jurors who were seated, the court need not look further to see whether the overall pattern of excluding *many* African-Americans who varied in only minor ways from white jurors supported a finding of discrimination.[22]

Under the Magistrate Judge's analysis, evidence one normally considers to be determinative in discerning the intent of an actor — evidence of an explicit policy governing the actions at issue, prior and subsequent behavior in similar circumstances by the specific actors involved, behavior in the case at hand that reveals the presence of intent — is "irrelevant" to an evaluation of intent. Evidence of a pattern

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[21] The Magistrate Judge did not dispute that *all* African-American jurors (and anti-death penalty white jurors) were questioned so as to make them vulnerable to exclusion on the issue of minimum punishment. The fact that the prosecutor was able to exclude 10 African-Americans without resort to the minimum punishment issue does not negate this fact. Although it may not be dispositive of the issue, the evidence certainly casts light on the prosecutors' determination to exclude African-Americans by whatever means necessary.

[22] The Magistrate Judge deferred to the "credibility determination[s]" of the state trial judge on the disparate treatment issue. Cert. App. 5, at 16. But as we have seen, the trial judge did not consider, when making those determinations, that the District Attorney's office had a policy of discrimination nor that there were "appalling" statistics proving widespread discrimination by the office. He made the determinations in the context of his own disinclination to believe that discrimination had occurred. Moreover, the Magistrate Judge simply ignored the fact that the prosecutor often gave multiple explanations for a strike, some of which were demonstrably pretextual, *i.e.*, they depended not on "demeanor" issues like "hesitancy" but on simple facts (*e.g.*, whether a juror was Catholic) which applied equally to African-American jurors who were struck and white jurors who were not.

and practice of discrimination is confined to consideration of whether a *prima facie* case has been proven. The Magistrate Judge replaced the "crippling burden of proof" denounced by this Court in *Batson*, 476 U.S. at 92, with another one that purports to come from *Batson* itself.

D. *Batson* Requires Consideration of All Relevant Evidence of Discrimination

Although *Batson* set out a three-part procedure for analyzing claims of discriminatory use of peremptory challenges, it is clear that the Court did not intend those "steps" to be isolated and unrelated inquiries, with evidence confined to one step or another. Nor did it envision the piecemeal examination of individual voir dires, each in isolation from the other, as a sufficient evaluation of the presence of discrimination.

The Court recognized that the exercise of peremptory challenges provides the opportunity to carry out the "conscious and unconscious prejudice [that] persists in our society," *Georgia v. McCollum*, 505 U.S. at 61 (Thomas, J., dissenting). "[T]he defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Batson*, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. at 562).

Although the Court's discussion in *Batson* of the kind of evidence that would be relevant to proof of discrimination came in the portion of the opinion discussing proof of a *prima facie* case, it in no way hinted, implied, insinuated, or suggested -- let alone stated -- that such proof of discrimination should not be considered when deciding the ultimate question of whether discrimination occurred.

The Court has long observed that proof of purposeful discrimination can come from many sources. "In deciding if the defendant has carried his burden of persuasion, a court must undertake a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.' *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). Circumstantial evidence of invidious intent may include proof of disproportionate impact. *Washington v. Davis*, 462 U.S.[229] at 242 [(1976)]." *Batson*, 476 U.S. at 93. A defendant may rely on "any . . . relevant circumstances" and "a combination of factors" in establishing a claim of jury discrimination. Courts should consider "all relevant circumstances" in deciding whether the defendant has made the requisite showing. *Batson*, 476 U.S. at 96-97.[23]

It is clear this settled rule was not applied in this case; if it had been, the only reasonable conclusion would be that Petitioner met his burden of showing that racial bias motivated the striking of the excluded African American jurors.

III.

The Importance of Fulfilling *Batson's* Promise

Our final point is that the Court has more work to do to ensure the realization of *Batson's* promise. As the Court recognized six years after *Batson* was decided, "[d]espite the clarity of . . . [our] commands to eliminate the taint of racial discrimination in the administration of justice, allegations of bias in the jury selection process persist." *Powers v. Ohio*, 499 U.S. at 402. Commentators have attributed the persistence of

[23] Indeed, in a different context, the Court recently confirmed the application of this approach in age discrimination cases. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

such claims to the "toothlessness" of *Batson*.[24] But *amici* believe that the fault lies not with the decision itself, but with the misapprehension by the lower courts of its commands.

Despite *Batson*'s goal of eradicating racial discrimination in jury selection, some lower courts have accepted questionable "race-neutral" reasons for the exclusion of African-American prospective jurors;[25] they have atomized their analyses in a juror-by-juror discussion, refusing to look at the voir dire as a whole, thus allowing "race-neutral" reasons to

[24] *See, e.g.*, Leonard Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure to Meet the Challenges of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501 (1999) ("Only the most overtly discriminatory or impolitic lawyer can be caught in Batson's toothless bite and, even then, the wound will be only superficial."); Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 Am. Crim. L. Rev. 1099, 1104 (1994) (arguing that the *Batson* line of cases "was misguided from the outset because it failed to appreciate the 'interest litigants have in continuing to discriminate by race and gender if they can get away with it[]'"); *See, e.g.*, David C. Baldus, et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 81 (2001) (noting Supreme Court decisions prohibiting race or gender-based peremptory strikes have had "at best [] only a marginal impact on the peremptory strike strategies of each side" in Philadelphia, possibly because counsel for both sides "have little expectation that the courts will sustain a claim of discrimination even if it is based on solid evidence"); *see id.* (presenting statistical data reporting the prosecutorial strike rates pre- and post-*Batson* against black and non-black venire members, and concluding that a sharp *upswing* in the use of peremptory strikes against black venire members post-*Batson* may reflect the perception that the decision would have little actual clout).

[25] For a compilation of examples, *see* Sheri Lynn Johnson, *Batson Ethics for Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 475, 489-90, 493-49 (1998) and Cavise, *supra*, n. 24, at 531-35, 553.

justify patterns of striking virtually *all* black veniremembers;[26] and, in cases like petitioner's, they have refused to consider extensive evidence bearing on the issue of the prosecutor's intent.[27]

But other courts have found in *Batson* ample tools to hold prosecutors accountable for their race-based exclusions. For example, the Seventh Circuit had no trouble recognizing that *Batson* required the consideration of all evidence in a case. *Coulter v. Gilmore*, 155 F.3d 912, 921 (7th Cir. 1998) ("The *Batson* decision makes it clear that, one way or another, a trial court must consider all relevant circumstances before it issues a final ruling on a defendant's motion."). [28] The Third Circuit has recognized that a history of discrimination by the prosecutor's office is probative. *Riley v. Taylor*, 277 F.3d at 283-84. Other courts have found disparate treatment despite a lack of total identity in juror responses.[29] Still others have

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[26] *See* Charles J. Ogletree, *Supreme Court Jury Discrimination Cases and State Court Compliance, Resistance and Innovation*, in TOWARD A USABLE PAST 339, 349 (Paul Finkelman & Stephen E. Gottlieb eds., 1991) at 352 ("State trial courts frequently accept prosecutorial explanations that, although somewhat plausible, have a disparate effect on minorities and therefore may become convenient excuses for rationalizing challenges against minorities.").

[27] *See e.g., Riley v. Taylor*, 277 F.3d 261, 283-84 (3rd Cir. 2001)(*en banc*).

[28] *See also, e.g., State v. Givens*, 776 So. 2d 443, 449 (La. 2001) (holding that a defendant "may offer any facts relevant to the question of the prosecutor's discriminatory intent . . .[which] include, but are not limited to, a pattern of strikes . . . against members of a suspect class, . . . the composition of the venire and of the jury finally empaneled, and any other disparate impact upon the suspect class").

[29] *See, e.g., Burnett v. State*, 27 S.W.3d 454 (Ark. App. 2000); *People v. Morales*, 719 N.E.2d 261 (Ill. App. 1999).

refused to credit reasons as "race-neutral" because of the pattern of strikes in a particular case.[30]

Given the overwhelming *and* unrebutted evidence in this record of purposeful exclusion of African American jurors in Dallas over a significant period of time, as well as the Court's unbroken line of cases dating back more than 100 years prior to the trial in this case that clearly condemns such behavior, we can only conclude that the judges who made the findings in this case — both the state trial judge and the Magistrate Judge — could not bring themselves to apply the law that plainly required that this evidence be considered at *Batson's* stage three. They acted as if the history of jury discrimination documented in scores of opinions from this Court, did not exist, as if behavior was not evidence of intent, as if no action had any relationship to any other -- as if they had walked into what was plainly a

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[30] *Robinson v. State*, 773 So.2d 943, 949 (Miss. App., June 27, 2000) ("[B]ased on our review of this record, we find the reasons offered by the State to be so contrived, so strained, and so improbable, that we are persuaded that they unquestionably fall within the range of those 'implausible or fantastic justifications' mentioned in *Purkett v. Elem* that ought to 'be found to be pretexts for purposeful discrimination.' *Purkett v. Elem*, 514 U.S. 765, 768 (1995)."). In *Robinson*, the state used 7 of 10 peremptory challenges to exclude prospective African-American jurors. Reasons proffered by the prosecution were 1) perceived hostility to the prosecution; 2) possible irresponsibility evidenced by the fact that the questionnaires showed the jurors had children but were not married, although the prosecutor did not know whether the jurors were divorced or had children out of wedlock; 3) juror lived in a high crime area; 4) sleeping during voir dire; 5) not providing answers on the questionnaire that created uncertainty about ties to the community; 6) serving on a jury that acquitted. The Court found that although some of the proffered reasons for striking some of the jurors had been found to be race-neutral by prior case law, "there is no requirement that every challenge be clearly objectionable in order to conclude that the State was impermissibly making a calculated effort to exclude as many African-Americans as could reasonably be done from the jury." *Robinson*, 773 So.2d at 950. Viewing the totality of the circumstances, the Court concluded that *Batson* was violated. *Id.*

forest and saw only leaves. Like others throughout the sordid history of race-based exclusions of African-American citizens from jury service, they were apparently incapable of looking behind the mask of racial neutrality worn by those of a mind to discriminate. Their blindness invites cynicism and anger from those who saw — and see — the reality of Dallas County in the 1980s: the defendants who watched African-Americans being struck, one after another, from their juries; the African-American citizens who arrived for jury duty only to be sent home humiliated and intimidated; the reporters who watched and gathered evidence of the system at work; and all the readers of the articles that so graphically portrayed the nefarious behavior of the prosecutors.

The decisions below are thus seriously flawed. They failed to heed this Court's declaration in *Batson* that "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Batson*, 476 U.S. at 85. Vigorous and faithful application of the Court's teaching is the least that can be expected of state and federal judges who take the oath of office and swear to uphold the Constitution of the United States. The Court must make clear in this case that it shares that expectation.

CONCLUSION

"Notwithstanding history, precedent, and the significant benefits of the peremptory challenge system, it is intolerably offensive for the State to imprison a person on the basis of a conviction rendered by a jury from which members of that person's minority race were carefully excluded." *Powers v. Ohio*, 499 U.S. at 430 (Rehnquist, C.J., dissenting). Petitioner's was just such a jury.

Despite clear and emphatic statements condemning race discrimination in the selection of juries in this Court's decisions since 1879, prosecutors in Dallas County in 1986 openly followed a policy of excluding African-Americans through the use of peremptory challenges.

As our nation's history aptly demonstrates, discrimination in jury selection will continue unless this Court reaffirms in clear and emphatic language that review of a *Batson* claim is not a shell game, but the exercise of steadfast and resolute judicial commitment to ending race-based exclusions of African-American citizens from participation in the American judicial process.

Petitioner's conviction and sentence of death should be reversed.

Respectfully submitted,

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No. 01-7662

IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE*, FORMER PROSECUTORS AND JUDGES, IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the Court of Appeals err in denying a certificate of appealability and in evaluating petitioner's claim under *Batson* v. *Kentucky*?

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BRIEF OF *AMICI CURIAE*, FORMER PROSECUTORS AND JUDGES, IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

Amici curiae, are former judges and former prosecutors, identified in the Appendix, who maintain an active interest in the fair and effective functioning of the criminal justice system. *Amici* are deeply committed to ensuring that criminal

[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. This brief was written by counsel for *amici curiae* with the assistance of Racheal Turner, a student at the University of California School of Law (Boalt Hall). No person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), the parties have consented to the filing of the brief of *amici curiae* and their letters of consent accompany this brief.

trials, and especially death penalty proceedings, are conducted in an atmosphere free of racial prejudice. Allegations of race discrimination by representatives of the government must be scrutinized to assure just and reliable outcomes in criminal cases, to safeguard the democratic right of all citizens to be considered for jury service, and to promote public trust in the criminal justice system.

This case is of vital interest to members of the bench and to law enforcement officials. Judges act as the ultimate guardians of the judicial process. "The courts are under an affirmative duty to enforce the strong statutory and constitutional policies embodied in [the] prohibition [against discrimination in the selection of jurors]." *Powers v. Ohio*, 499 U.S. 400, 416 (1991). For their part, prosecutors have a "special role" to ensure that justice is done, even at the expense of the legitimate adversarial interest in the outcome of a criminal case. *Strickler v. Greene*, 527 U.S. 263, 281 (1999). The prosecution function suffers when the criminal justice system operates in a discriminatory manner, such as when peremptory challenges are used to exclude citizens from juries based upon race.

INTRODUCTION AND SUMMARY OF ARGUMENT

When race-based exclusion of jurors goes unremedied, excluded jurors and all participants in the trial process are harmed. Even the perception that racial bias is tolerated weakens public confidence that our courts can guarantee equal justice. To remedy both the use of race-based peremptory challenges and the belief that such discrimination is occurring, it is imperative that judges adhere scrupulously to *Batson*'s three-step inquiry.

In making the ultimate determination whether peremptory challenges were exercised in a racially discriminatory manner, which is *Batson*'s third step, courts must consider *all* of the available evidence that supports an inference of purposeful discrimination, including the evidence presented at

step one to establish a *prima facie* case of discrimination. Where, as before the defendant has demonstrated a strong *prima facie* case of racial discrimination, it is particularly harmful for the judge to accept the prosecution's proffered race-neutral justifications without considering such critical information as evidence of a pattern of discrimination (by the attorney or his or her office), as well as disparate application of the race-neutral justifications to persons of different races and false reasons proffered (and rejected) during the second step of *Batson*. Requiring that courts consider such evidence not only will be consistent both with the treatment of credibility and pretext assessments by courts in other contexts and with common sense, but also will assure the public that the courts take seriously their roles as gatekeepers against racial discrimination in the courthouse. *See*, *infra*, Part II.

Applying the settled *Batson* standard to the facts of this case, the conclusion is inescapable that the prosecution exercised its peremptory challenges at petitioner's capital trial in violation of the Fourteenth Amendment. *See*, *infra*, Part III.

ARGUMENT

I. ERADICATING RACE-BASED PEREMPTORY CHALLENGES REMAINS A JUDICIAL IMPERATIVE.

According to a recent American Bar Association survey, the public's continued support for our justice system stems from its trust in the role of the jury.[2] Indeed, this understanding of the significance of the jury as an institution

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[2] American Bar Ass'n, *Perceptions of the U.S. Justice System* 6-7 (1999) ("*Perceptions of the U.S. Justice System*"), *available at* http://www.abanet.org/media/perception/perceptions.pdf. Seventy-eight percent of respondents believe that the jury system is the fairest way to determine guilt or innocence, and 69 percent believe that juries are the most important aspect of our justice system. *Id.*

motivated, in part, this Court's landmark decision in *Batson v. Kentucky*, 476 U.S. 79, 86 (1986), which held that the Equal Protection Clause of the Fourteenth Amendment prohibits prosecutors from exercising peremptory challenges to exclude potential jurors on the basis of race. *Batson* recognized that the jury occupies a "central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge." *Id.* (citing *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)); *see also Powers*, 499 U.S. at 411 ("The jury acts as a vital check against the wrongful exercise of power by the State and its prosecutors."). By compromising the representative quality of the jury, racially discriminatory selection procedures deny the defendant this fundamental protection against injustice. *See Batson*, U.S. at 86 n.8. Beyond the injury to the defendant, the harm from discriminatory jury selection touches the excluded jurors and the entire community. *Id.* at 87; *see also Powers*, 499 U.S. at 406-07. Indeed, the exercise of race-based peremptory challenges "undermine[s] public confidence in the fairness of our system of justice," which threatens the integrity and legitimacy of the system itself.[3] *Batson*, 476 U.S. at 87.

Jury service maintains the "democratic element of the law" and "ensures continued acceptance of the laws by all of the people." *Powers*, 499 U.S. at 407; s*ee also Duncan v. Louisiana*, 391 U.S. 145, 187 (1968) (Harlan, J., dissenting) (Jury service "affords ordinary citizens a valuable opportunity to participate in a process of government, an experience

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[3] *Amici* recognize, however, that the peremptory challenge system is a traditional and necessary aspect of American jury trials. *See Swain v. Alabama*, 380 U.S. 202, 212-18 (1965). Peremptory strikes ensure a fair trial, not just for the accused, but also for the prosecution. *See id.* at 220. *Amici* do not advocate eliminating peremptory challenges because they believe that the process can be administered in accordance with the Equal Protection limitations this Court established in *Batson*. To that end, vigorous enforcement of *Batson* is required.

fostering ... a respect for law."); *J.E.B. v. Alabama*, 511 U.S. 127, 145 (1994) (noting the equal opportunity to participate in the fair administration of justice is "fundamental to our democratic system"). When this Court first condemned the intentional exclusion of African Americans from juries, it observed that jury service is a fundamental aspect of citizenship because it permits ordinary citizens to "participate in the administration of the law." *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879). In *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922), this Court stated:

> The jury system postulates a conscious duty of participation in the machinery of justice .... One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse.

Apart from voting, for most citizens, jury service represents "their most significant opportunity to participate in the democratic process." *Powers*, 499 U.S. at 407. As Justice O'Connor recently observed, "[t]he time jurors spend in jury service is perhaps our best opportunity to instill in them a sense of trust in the fairness ... of the justice system." Justice Sandra Day O'Connor, Address at the National Conference on Public Trust and Confidence in the Justice System (May 15, 1999), *available at* http://www.ncsc.dni.us/ptc/trans/oconnor.htm.

A jury selection process that tolerates racial discrimination contravenes the democratic underpinnings of our criminal justice system and fosters disrespect and cynicism for the law as an institution. *Powers*, 499 U.S. at 411 (race-based peremptory challenges "'cast[] doubt on the integrity of the judicial process'" and "place[] the fairness of the criminal proceeding in doubt"); *id.* at 413; *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991). Indeed:

> A prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings. The overt wrong, often apparent to the entire jury panel, *casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the case*.... The composition of the trier of fact itself is called into question, and *the irregularity may pervade all the proceedings that follow*.

Powers, 499 U.S. at 412-13 (emphases added). As a result, there is a substantial risk that the verdict will not be accepted or understood as fair by the defendant, by some of the jurors, or by the community. *Id.* at 413.

In addition, the practice of race-based peremptory challenges reinforces negative stereotypes that defy the Equal Protection Clause and further undermines the public's confidence in the fairness of the justice system. In *Strauder*, this Court acknowledged that deliberate exclusion of African Americans from jury service "is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Strauder*, 100 U.S. at 308. More than a century after the decision in *Strauder*, an African American summoned for jury service in Brooklyn, New York wrote to the district attorney complaining about the prevalence of race discrimination in jury selection:

> "If we Blacks don't have common sense and don't know how to be fair and impartial, why send these summonses to us? Why are we subject to fines of $250.00 if we don't appear and told it's our civic duty if we ask to be excused? Why bother to call us down to these courts and then overlook us like a bunch of naïve and better yet ignorant children?"

Letter to Elizabeth Holtzman, District Attorney (Nov. 21, 1984), *reprinted in Amicus Curiae* Brief for Elizabeth Holtzman, District Attorney, Kings County, New York, at App., *Batson v. Kentucky*, 476 U.S. 79 (1986).[4] For those who experience the treatment described in this letter and who observe "[t]he overt wrong" of race-based jury exclusion, the criminal justice system and the rule of law inspire neither confidence nor respect. *Powers*, 499 U.S. at 412-13.

In a 1999 survey conducted by the National Center for State Courts, a majority of African Americans and Hispanics surveyed agreed with the statement: "Most juries are not representative of the community."[5] According to a former prosecutor and Dallas County's first African American felony court judge, "blacks have been so conditioned to expect unfairness from the justice system that many do not consider jury service a possibility." Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection*, Dallas Morning News, Mar. 9, 1986, at A1; Ed Timms & Steve McGonigle, *A Pattern of Exclusion*, Dallas Morning News, Dec. 21, 1986, at A1.[6]

Such distrust of the justice system is evident in the statements of Billie Jean Fields and Carol Boggess, who were among the African American citizens of Dallas County summoned as prospective jurors for petitioner's trial and challenged peremptorily by the prosecution. Upon learning of

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[4] Quoted in Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right is It, Anyway?*, 92 Colum. L. Rev. 725, 745 (1992).

[5] National Ctr. for State Courts, *How the Public Views the State Courts* 7, 29 (1999), *available at* http://www.ncsc.dni.us/ptc/results/results.pdf. *See also Perceptions of the U.S. Justice System*, at 12, 65 (47% of respondents strongly disagreed or disagreed with the statement that courts treat all ethnic and racial groups the same).

[6] Appendices 10-11 & 12-13, respectively, to Petition for Writ of Certiorari ("Pet. App.").

his own race-based exclusion from petitioner's jury,[7] Mr. Fields commented, "'White Protestant Americans are the only ones [who] have a right to serve in this country and to even live in this country.... It's not right for the justice system to be biased like this, but it's no surprise.'"[8] Ms. Boggess stated, "'It really upsets me that they think like that, that they think that they can't trust me, not even knowing who I am.'" She is angry, she says, that the prosecutors "'would discriminate against me ... and not look at me as a person, as an individual but as a color.'"[9]

As this Court recognized in *Batson*, "[i]n view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if [the courts] ensure that no citizen is disqualified from jury service because of his race." *Batson*, 476 U.S. at 99. The goal of *Batson* is to achieve the norm of zero tolerance for the discriminatory exercise of peremptory challenges.

II. A COURT MUST LOOK AT ALL RELEVANT EVIDENCE—INCLUDING THE DEFENDANT'S *PRIMA FACIE* CASE—IN DETERMINING WHETHER INTENTIONAL DISCRIMINATION OCCURRED.

While the *Batson* test, like other, similar tests addressing pretext in the context of allegations of racial discrimination, is a three-part test, *amici*'s concern in this case is with the

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[7] *See* Exhibit 1 to Petition for a Recommendation of a Reprieve of Execution and Commutation of Death Sentence (*In re Thomas Miller-El*), filed with the Texas Board of Pardons and Paroles on February 6, 2002. Exhibit 1, the videotape of these interviews, is available at http://www.deathpenaltyinfo.org/AudioVideo.html (last visited May 16, 2002).

[8] *Id.*

[9] *Id.*

application of the third step. Under the first step of the *Batson* test, the opponent of a peremptory strike must establish a *prima facie* case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson*, 476 U.S. at 93-94. It is clear that Miller-El produced sufficient evidence to establish a *prima facie* showing of discrimination required by *Batson*'s first step. Once a *prima facie* case has been made, step two requires the prosecution to come forward with race-neutral explanations for its peremptory challenges. *Id.* at 97. For purposes of this brief, *amici* assume that the lower courts were correct to conclude that the prosecution had produced race-neutral explanations for its peremptory challenges. *Id.* However, the courts below failed to consider all of the relevant evidence in evaluating step three: namely, whether Miller-El had established intentional discrimination. *See id.* at 98. Thus, *amici* focus here on the test to be applied by the courts under step three.

The courts' treatment of evidence during the third step of *Batson* is particularly crucial, for "[i]n the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Hernandez v. New York*, 500 U.S. 352, 365 (1991). The defendant retains the ultimate burden of persuasion, but "[i]t is not until the *third* step that the persuasiveness of the [prosecutor's] justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam). Thus, courts must inquire into "'such circumstantial and direct evidence of intent as may be available.'" *Batson*, 476 U.S. at 93 (quoting *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). "In deciding [at step three] whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances," *id.* at 96-97, which

means evidence produced by both sides, including evidence of historic, systemic discrimination—as well as the evidence available from the *voir dire* itself.

Evidence of an historic pattern and practice of discrimination is critically important under step three. While *Batson* sought to ensure that race-based peremptory challenges could be made even without evidence of historic, systemic race-based exclusion, *see id.* at 92-93,[10] it did not suggest that such evidence is unimportant. To the contrary, where, as here, the defendant offers substantial, undisputed evidence of a pattern and practice of striking African Americans on the part of the very prosecutors who tried him, the proffered race-neutral justifications for striking ten out of eleven eligible African American jurors become highly suspect. Ignoring strong evidence of pretext is inconsistent with the effort to ensure that prospective jurors are not subject to discrimination in the courthouse and to protect both jurors and the justice system from the harm caused by that discrimination.

No other area of credibility or pretext assessment ignores past practice (by the alleged discriminator, the attorney, or his or her office), training manuals, or other evidence tending to show that a justification given lacks credibility. In the employment discrimination context, past practice is treated as

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[10] Prior to *Batson*, which was intended to *strengthen* the right to nondiscriminatory jury selection, many courts had held that the only means of showing discriminatory intent was "proof of repeated striking of blacks over a number of cases." *Batson*, 476 U.S. at 92. *See also* American Bar Ass'n, *ABA Standards Relating to Juror Use and Management, Commentary to Standard 9 "Generally"* (1983 ed.) (noting, pre-*Batson*, that "[a]lthough the Supreme Court did articulate a test in *Swain v. Alabama* to determine the existence of systematic exclusion of blacks from juries, only rarely has it been possible to obtain the required statistical evidence of a pattern of discrimination.") (citation omitted).

significant evidence of discrimination.[11] *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 362 (1977) ("The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy."); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

This accords well with common sense: if a person consistently acts in a discriminatory manner, purposeful discrimination may be inferred and proffered race-neutral explanations may be rejected as pretextual. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973) ("Other evidence that may be relevant to any showing of pretext includes facts as to ... petitioner's general policy and practice with respect to minority employment."). As such, a reasonable person would find relevant the facts that the Dallas County prosecutor's office regularly engaged in discriminatory use of peremptory challenges and had a training manual instructing attorneys to engage in racial discrimination in selecting juries, and that the prosecutors in petitioner's case had been found to have engaged in racial discrimination in selecting juries in similar cases.[12] *See*

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[11] As this Court has acknowledged, cases interpreting Title VII of the Civil Rights Act of 1964 are highly relevant in explaining the evidentiary rules that govern allegations of race-based jury selection in the post-*Swain* era. *See, e.g., Purkett*, 514 U.S. at 768-69; *Hernandez*, 500 U.S. at 359-60; *Batson*, 476 U.S. at 94 n.18, 98 n.21. Like the *Batson* inquiry, the test for employment discrimination using indirect evidence is a three-step burden-shifting test, where the ultimate burden of persuasion remains at all times on the party challenging an action as discriminatory. *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

[12] In this regard, one court of appeals upheld a *Batson* credibility assessment based in part on "a prior pattern or practice of jury selection made by a particular prosecutor" where the judge found that the prosecutor had a practice of *not* engaging in racial discrimination. *United States v. Williams*, 934 F.2d 847, 850 (7th Cir. 1991).

Swain v. Alabama, 380 U.S. 202, 223-24 (1965); *infra*, Part III.

But, as this Court held in *Batson*, other evidence should also be considered in applying step three of *Batson*, just as such evidence is used in other contexts to establish pretext or to assess credibility. Thus, discrimination under *Batson* may be shown where a prosecutor, who after repeatedly striking African American jurors and retaining white jurors, points—as the reason for his decisions—to a characteristic that the excluded black jurors and the seated white jurors have in common. *See, e.g., Coulter v. Gilmore*, 155 F.3d 912, 921 (7th Cir. 1998). In the employment context, such differential treatment can similarly be used by a factfinder to conclude that the employer is lying about its reason for terminating a given employee. *See, e.g., Krieger v. Gold Bond Bldg. Prods.*, 863 F.2d 1091, 1098 (2d Cir. 1988). Similarly, if an attorney offers several reasons, some demonstrably false but others sufficient if true to establish the second step of *Batson*, for striking a juror, the court should consider the fact that the attorney offered false reasons when deciding if the legitimate reasons are credible. This is consistent with the lower courts' practices in evaluating pretext in the employment discrimination context.[13] Thus, factfinders should consider the fact that an attorney has offered false reasons in deciding whether to reject as noncredible the other, legitimate reasons offered for striking a juror. *Riley v. Taylor*, 277 F.3d 261, 283 (3d Cir. 2001) (en banc); *United States v. Chinchilla*, 874 F.2d 695, 699 (9th Cir. 1989).

In contrast to the Fifth Circuit, the Second, Third, Sixth, and Seventh Circuits have adhered to this Court's clear

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[13] *See Fuentes v. Perskie*, 32 F.3d 759, 764 n.7 (3d Cir. 1994); *Smith v. Chrysler Corp.*, 155 F.3d 799, 809 (6th Cir. 1998); *Russell v. Acme-Evans Co.*, 51 F.3d 64, 70 (7th Cir. 1995); *Tyler v. Re/Max Mountain States, Inc.*, 232 F.3d 808, 814 (10th Cir. 2000); *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1298 (D.C. Cir. 1998) (en banc).

precedent regarding *Batson*'s third step, affirming that a court should "assess the totality of the circumstances surrounding the strike in the analysis of whether the defendants have met their ultimate burden of proving discrimination" under *Batson*—including the evidence that comprised the *prima facie* case. *United States v. Hill*, 146 F.3d 337, 342 (6th Cir. 1998); *see also Riley*, 277 F.3d at 283-84; *Jordan v. Lefevre*, 206 F.3d 196, 201 (2d Cir. 2000); *Coulter*, 155 F.3d at 921-22. In *Riley*, the Third Circuit properly insisted that "the significance of evidence of systematic exclusion of blacks in jury selection" must be weighed at step three. 277 F.3d at 284. Most particularly, courts must not do what the courts below in this case did, which is to consider "each piece of evidence ... in isolation." *Id.* at 283-84.

Where, as here, substantial, compelling evidence thoroughly undermines the credibility of the prosecutors who proffered race-neutral reasons for striking ten out of eleven eligible African American jurors, the only reasonable conclusion is that racial exclusion, and not the proffered race-neutral reasons, was the motivation for the prosecutor's peremptory challenges. In short, the third prong of *Batson* is not just the letter of the law, but the last clear chance to protect the interests of all participants in the judicial system.

Consistency and accuracy are not the only reasons why it is important for courts to consider all of the relevant evidence—including history of discrimination—in deciding whether a *Batson* violation has occurred. Considering all of the evidence that a reasonable person could use to assess the credibility of an attorney's claim that his or her use of a peremptory strike was race-neutral, does no more than respect common sense. When a court explicitly considers all of the relevant evidence that applies to credibility, the court gives legitimacy to the proceedings and makes clear to all interested parties that the court has acted as a gatekeeper to prevent discrimination in the judicial system. Conversely, when a court accepts uncritically an attorney's race-neutral

justifications, without considering compelling evidence of pretext, the court not only ignores the import of the third prong of *Batson*, but also creates the appearance that the court is complicit in the *Batson* violation.

In *Edmonson*, this Court emphasized that "[b]y enforcing a discriminatory peremptory challenge, the court 'has not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination.'" 500 U.S. at 624 (alterations in original) (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)). As such, where a *prima facie* case of race discrimination is established under *Batson*, a court must take special care in evaluating the proffered race-neutral justifications for challenged peremptory strikes in order to avoid "participat[ing] in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders." *J.E.B.*, 511 U.S. at 140.

III. A REVIEW OF THE TOTALITY OF THE EVIDENCE UNDER A PROPER *BATSON* ANALYSIS REQUIRES THAT PETITIONER'S CONVICTION BE REVERSED.

None of the state and lower federal courts questioned whether petitioner had established a *prima facie* claim of a *Batson* violation. Similarly, all of the courts who heard this case were satisfied that the prosecution had offered race-neutral explanations for its peremptory challenges. However, each court in its turn improperly truncated the third step of the *Batson* analysis, refusing to consider *all* of the relevant evidence and performing no analysis of the totality of the circumstances presented by petitioner. Yet, as shown above, it violates the settled rule of *Batson* for a court to consider evidence to determine if a threshold showing has been met, but then to refuse to consider that same evidence when evaluating the overall merit of the claim. *See*, *supra*, Part II.

That, however, is exactly the error committed by each of the courts that reviewed petitioner's claim.

In its Findings of Fact and Conclusions of Law issued following the *Batson* hearing on remand, the trial court failed to consider the evidence submitted by the petitioner showing a pattern of race-based peremptory challenges. Indeed, none of the historical evidence presented by the petitioner is referred to in the trial court's findings of fact. Limiting its focus to evaluating the *voir dire* of the jurors and the prosecutors' explanations for their strikes, the court found that "the evidence did not even raise an inference of racial motivation in the use of the State's peremptory challenges." *Ex Parte Miller-El*, No. 8668 N.L., slip op. at 4, 6 (Crim. Dist. Ct. of Dallas County Jan. 13, 1988) (Findings of Fact and Conclusions of Law Upon Remand). The court ignored its duty to evaluate the totality of the circumstances under step three of the *Batson* inquiry, effectively denying petitioner meaningful judicial review and perpetuating the very harm that *Batson* is supposed to correct.

This constitutional error was repeated by the Texas Court of Criminal Appeals ("CCA"), which also ignored the third step of the *Batson* analysis. Again, the court did not even mention the evidence—undisputed by the State—of the systemic, historical use of peremptory challenges against African Americans by the Dallas County District Attorney's Office. Pet. App. 2, at 1-2 (*Miller-El v. State*, No. 69,677 (Tex. Crim. App. Sept. 16, 1992) (en banc) (per curiam) (unpublished)). The CCA also evaluated the race-neutral reasons for the peremptory strikes only with respect to the transcript of the *voir dire* of the challenged jurors, rather than considering the totality of the circumstances.

In his review of petitioner's federal habeas petition, the magistrate judge noted that petitioner had presented copious and multifaceted evidence in support of his claim. Pet. App. 5, at 20 (*Miller-El v. Johnson*, No. 3:96-CV-1992-H (N.D. Tex. Jan. 31, 2000) (unpublished)). Nonetheless, the

magistrate judge again considered only the historical evidence in deciding that petitioner had established a *prima facie* case, stating first that historical evidence is of limited value, and is only useful to "help[] him establish a *prima facie* case for discrimination." *Id.* He declined to evaluate the "appalling" and "disturbing" evidence of persistent racism in the State's selection of jurors in reaching his final determination. *Id.* Adopting the findings of the magistrate judge, the district court placed its seal of approval on the crabbed *Batson* analysis conducted by the state courts. According to the district court, the CCA properly analyzed the historical evidence of discriminatory uses of peremptory challenges when it determined that while petitioner had raised an "inference of purposeful discrimination" "further discussion of the evidence in support of the prima facie case was unnecessary." Pet. App. 6, at 4 (*Miller-El v. Johnson*, No. 3:96-CV-1992-H (N.D. Tex. June 5, 2000) (unpublished)).

Lastly, in denying the petitioner's request for a Certificate of Appealability, the United States Court of Appeals for the Fifth Circuit sanctioned the lower courts' refusal to consider the evidence of systemic exclusion of African American jurors by Dallas County prosecutors beyond the first step of the *Batson* inquiry. Pet. App. 1, at 7-12 (*Miller-El v. Johnson*, 261 F.3d 445, 450-51 (5th Cir. 2001)). The Fifth Circuit also unreasonably and erroneously relied on the trial court's misapplication of *Batson* by leaving undisturbed the State courts' truncated third stage of the *Batson* inquiry.

Given the weight and power of petitioner's evidence, the denial of petitioner's *Batson* claim is astonishing. *Amici* believe that a proper review of the totality of the evidence relied on by petitioner can lead to only one reasonable conclusion: that the prosecutors improperly used peremptory challenges in a racist manner.

The actions of the prosecutors in petitioner's trial strongly suggest that their use of peremptory challenges was improper. Ten of the eleven eligible African American jurors were

peremptorily struck by the prosecution in petitioner's case. Pet. App. 5, at 6. Although the Fifth Circuit has suggested that there may be no discrimination so long as there are one or two minorities who are approved to sit on the jury, *United States v. Ratcliff*, 806 F.2d 1253, 1256 (5th Cir. 1986), surely the acceptance of one minority juror cannot correct the improper exclusion of ten (especially since this form of quota would allow attorneys to shield themselves against any discrimination claim). As this case shows, the acceptance of one minority juror does not, standing alone, reflect an absence of discriminatory intent. To the contrary, it may signal that the particular juror has pro-prosecution characteristics that mitigate his race, such as being extremely pro-death penalty. Indeed, the one minority who did sit on the jury for petitioner's trial indicated during *voir dire* that execution was too humane a form of punishment, suggesting instead that defendants be coated with honey and eaten by ants. Pet. App. 5, at 6 n.4.

The prosecutors also "shuffled" the jury pool so that more African Americans were located near the back of the pool, thereby increasing the likelihood that they would be dismissed before they were ever questioned. After petitioner's attorneys had the jury pool shuffled so that there were a number of black jurors at the front of the pool, the prosecutors suddenly complained that the shuffling had been performed improperly.

Finally, prosecutors conducting the *voir dire* at petitioner's trial frequently questioned black and white jurors differently, in an attempt to find grounds to strike black jurors for cause. For example, white jurors were told what the minimum sentence would be for a lesser included offense, and then were asked if they could enforce such a sentence. Black jurors, on the other hand, were asked open-ended questions about what they thought the minimum sentence would be. If the juror suggested a minimum sentence that was higher than what the law provided, the prosecutor would then argue that

the response suggested that the juror would not be able to apply the minimum sentence, and should, therefore, be excluded from the jury. Pet. App. 5, at 13. In other instances, prosecutors would express grave concern if a black juror had anything that might conflict with jury duty, such as an inability to take time off from work, while disregarding similar problems raised by white jurors.

The State offered three general reasons for its peremptory strikes. First, the State claimed that some of the stricken jurors expressed hesitance or ambivalence about applying the death penalty and also about whether they could convict petitioner for a lesser included offense. Pet. App. 5, at 14. Second, in a related reason, the State professed purported concern that the religious beliefs of some of the excluded jurors would interfere with their service. Third, some of the jurors were excluded from the jury because they had relatives who had been charged with or convicted of committing a crime. However, the transcript of the *voir dire* strips the State's race-neutral explanations of all credibility. First, the prosecution's concern that a potential juror might be too hard on crime is simply not plausible on its face. In addition, whites and blacks were questioned differently with respect to minimum sentences in a manner suggesting that the prosecution was attempting to solicit information to strike the black jurors for cause. *See Coulter*, 155 F.3d at 921 ("A facially neutral reason for striking a juror may show discrimination if that reason is invoked only to eliminate African American prospective jurors and not others who also have that characteristic."). Beyond that, the prosecution never struck a white juror for any of the reasons that it used against black jurors. No white juror was struck for having a relative who had been arrested or convicted of a crime—though at least one white juror did. Nor were any white jurors struck for their religious background—even though at least one white juror was, like a stricken black juror, Roman Catholic. White jurors who expressed a belief in

rehabilitation, and so favored life sentences over the death penalty, were left unquestioned by the prosecution—in sharp contrast to black jurors.

Although the evidence culled from petitioner's trial is compelling in its own right, when viewed in light of the historical evidence of discrimination by the Dallas County District Attorney's Office, it becomes overwhelming. Not only did petitioner present an astonishing volume of evidence suggesting that the Dallas County District Attorney's Office at the time of his trial systemically sought to strike African American jurors as a matter of course, but the State in turn left the majority of the evidence undisputed. This evidence included two internal memoranda, distributed among district attorneys in training materials, advising that minorities should not be permitted to sit on juries. One memorandum written in 1963 advised attorneys not to accept "'Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or well educated.'" Pet. App. 11, at 10. Six years later, another memorandum counseled that minority jurors were undesirable because they were more inclined to sympathize with the accused. Pet. App. 8, at 3.

A statistical analysis conducted by the *Dallas Morning News* at the time of petitioner's trial illustrated the actual impact of the district attorneys' training. The numbers speak for themselves: although 18 percent of the population of Dallas County was black, only four percent of jurors were. Prosecutors used peremptory challenges against 86 percent of otherwise eligible black jurors, meaning that any given eligible minority juror had a one-in-ten chance of being chosen for a jury, as opposed to white candidates, who had a one-in-two chance of being selected. Pet. App. 11, at 1. Focusing exclusively on capital cases, the *Dallas Morning News* found that in the 15 then-most recent capital cases, over ninety percent of qualified black jurors were peremptorily struck by the prosecution, leaving them with a one-in-twelve chance of being chosen to sit on a jury, as compared to a one-

in-three chance for whites. In those 15 trials, with 180 jurors, only five were black. Pet. App. 13, at 1.

Indeed, one of the prosecutors in petitioner's trial conducted *voir dire* in a number of the trials cited in the *Dallas Morning News* study. In another case tried by this same prosecutor, the defendant successfully challenged the use of peremptory challenges to strike minority jurors. The court in that case found that the race-neutral explanations offered by the prosecutor for the strikes were not credible. *Chambers v. State*, 784 S.W.2d 29, 32 (Tex. Crim. App. 1988) (en banc). Another prosecutor involved in petitioner's trial was also found in a subsequent case (against petitioner's wife) to have used peremptory challenges to strike black jurors, and to have failed to offer plausible race-neutral explanations. *(Dorothy) Miller-El v. State*, 790 S.W.2d 351, 356-57 (Tex. App. 1990). These prosecutors both improperly struck jurors based on their race and failed to provide adequate explanations for their actions immediately before, and immediately following, petitioner's trial. Ignoring such compelling evidence at step three renders *Batson*'s promise hollow.

So blatant was the method of excluding minorities from juries by the Dallas district attorney's office that state trial court judges readily testified to their first hand observations of the practice in their courtrooms. Pet. App. 5, at 7 n.6. One judge went so far as to exclude a prosecutor from his courtroom for egregious discrimination in his method of selecting jurors. *Id.* (noting that five current or former judges, two prosecutors, and two defense attorneys testified to the district attorney office's practice of excluding African Americans from jury service).

The courts below had before them this evidence of the history of racial discrimination by the Dallas County District Attorney's Office, but they confined its use to determine whether a threshold showing of a *Batson* claim had been met. No court considered the historical evidence together with the

evidence from petitioner's actual trial. By separating their analysis of the historical evidence from their evaluation of the use of peremptory challenges at petitioner's trial, the courts below erroneously insulated the prosecutors' proffered race-neutral justifications. These race-neutral explanations, however, could not counter the weight of the entirety of the evidence presented. The evidence from the *voir dire* alone raises implications of racial discrimination, but when viewed through the lens of the historic evidence of discrimination by the Dallas County District Attorney's Office, there becomes only one reasonable conclusion: that black jurors were impermissibly stricken as jurors from petitioner's trial. The courts below would have reached this conclusion if they had correctly applied the settled rule of *Batson* and considered all of the facts before them.

The prosecutors in this case engaged in conduct long-prohibited by the Equal Protection Clause, and each of the courts below failed to remedy the wrong done to the petitioner and to the constitutional principles of *Batson*. While a prosecutor's duty is to seek justice for those who are harmed and punishment for those who transgress the law, this purpose is not served by seeking a conviction at any cost. The goals of the criminal justice system are not met when a guilty man is convicted by constitutionally improper means. *Strickler*, 527 U.S. at 281. A conviction must be won fairly and in accord with constitutional guarantees in order for it to command public confidence. This is especially so in a death penalty case where the imposition of sentence is irreversible. Any reasonable suspicion that race played any part in the final judgment is simply intolerable. *Riley*, 277 F.3d at 287 ("We cannot avoid noting that *Batson* was not a death penalty case. This is. If the State failed to accord Riley his constitutional right to a jury selected on a race-neutral basis, we must not shirk to so hold.").

The rule established by this Court in *Batson* has no meaning if not properly applied. Failure to correct

unconstitutional actions by attorneys at trial compounds the harm to the justice system. First, it makes the courts complicit in the discriminatory actions of the trial attorneys. Second, it erodes the public's belief that courts will not shirk their duties to enforce the Constitution. As the guardians of judicial process and the enforcer of the constitutional principles that prohibit discrimination in the selection of jurors, *Powers*, 499 U.S. at 416, courts have the ultimate duty to ensure that the zero tolerance mandate of *Batson* is fulfilled. Thus far in this case, the courts have not fulfilled their role.

The constitutional violations that occurred at Thomas Miller-El's trial are precisely those *Batson* was designed to avert, and if committed, redress. This Court in *Batson* acted to lift the heavy burden established in *Swain* that a defendant must show a history of discrimination in the prosecutor's use of peremptory challenges, continuing unabated before and through the defendant's trial, in order to establish an equal protection violation. *Batson*, 476 U.S. at 92-93. In this case, however, petitioner actually has powerful evidence of the kind required by *Swain*; he has presented evidence of a systemic and historical practice of the discriminatory use of peremptory challenges by the prosecutor that continued up to and after his trial. Although the petitioner has satisfied the "crippling" burden of *Swain*, the State and lower courts nonetheless have found that his claim founders under what was intended to be the more protective standard of *Batson*. This perverse result is the product of the courts below deliberately restricting the use of the historical evidence to the first stage of the *Batson* inquiry and refusing to consider this "appalling" and "disturbing" evidence when deciding whether, under the totality of the circumstances, there has been discrimination. This reading of *Batson* cannot stand.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the lower courts and grant petitioner a new trial.

Respectfully submitted,

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APPENDIX

APPENDIX

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